The Supreme Court
FILED
OCT 16 1891
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1891.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Complainant and Appellant,
vs.
THE DENVER AND RIO GRANDE RAILROAD COMPANY,
Defendant and Appellee.

No. 1695. APPEAL. 1095

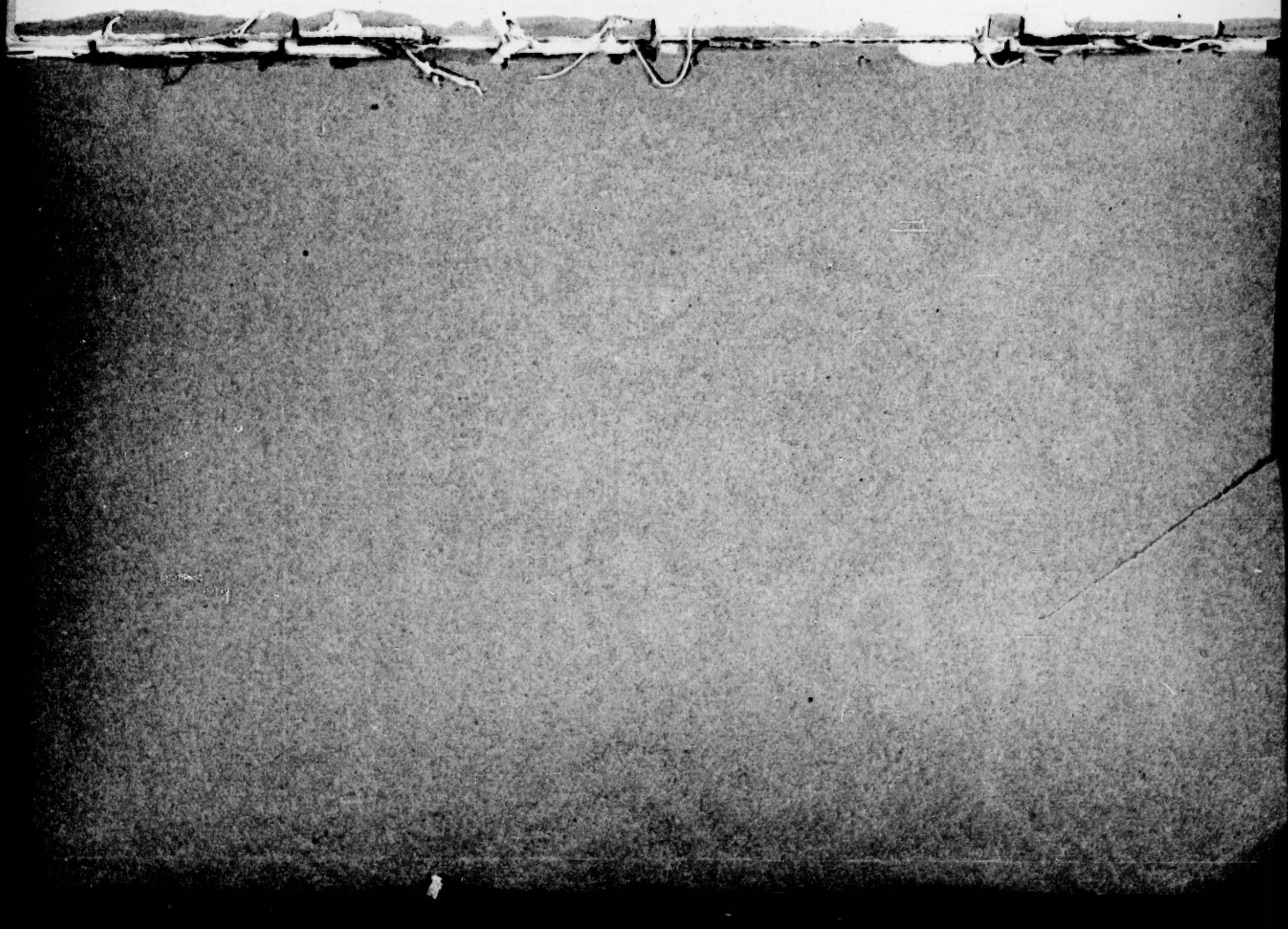
THE DENVER AND RIO GRANDE RAILROAD COMPANY,
Defendant and Cross-Appellant,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Complainant and Cross-Appellee.

No. 1711. CROSS APPEAL. 1109

Appeal and Cross-Appeal from the Circuit Court of the United States, District of Colorado.

ASSIGNMENT OF ERRORS BY THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, PLAINTIFF AND APPELLANT.

THOMAS F. WITHROW,
THOMAS S. WRIGHT AND
A. E. PATTISON,
FOR PLAINTIFF AND APPELLANT.



IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1891.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Complainant and Appellant,
vs.
THE DENVER AND RIO GRANDE RAILROAD COMPANY,
Defendant and Appellee.

No. 1695.
APPEAL.

THE DENVER AND RIO GRANDE RAILROAD COMPANY,
Defendant and Cross-Appellant,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Complainant and Cross-Appellee.

No. 1711.
CROSS APPEAL.

Appeal and Cross Appeal from the Circuit Court of the United States, District of Colorado.

ASSIGNMENT OF ERRORS BY THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, PLAINTIFF AND APPELLANT.

Now comes The Chicago, Rock Island and Pacific Railway Company, plaintiff and appellant in the cause first above entitled, and defendant and appellee in the second cause above entitled, and says, that there was and is manifest error in the record of the Circuit court of the United States for the district of Colorado in said cause first above entitled, as follows:

I. The court erred in ordering and adjudging, in the final decree therein, that the plaintiff is not, under the contract of February 15, 1888, a copy of which is appended as an exhibit to its bill of complaint in said cause, "entitled, nor has it any right to bring its engines, cars or trains over the track of the Union Pacific Railway Company into or upon the Denver terminals of the defendant company."

II. That said court also erred in ordering and adjudging by said final decree, that the complainant "has no right under the said contract in the tracks, switches, side-tracks or terminals of said defendant except for such business as it brings upon said tracks by way of the city of Colorado Springs."

III. That said court also erred in ordering and adjudging, in said final decree, that "the rights granted under said contract by the defendant to the said, The Chicago, Rock Island and Colorado Railway Company run with and are appurtenant solely to the line of railway belonging with the defendant's line of railway at said city of Colorado Springs."

IV. That the court erred in ordering and adjudging, in said decree, that the plaintiff is "under said contract entitled to carry business to and from any portion of defendant's said line of railway described in said contract by way of the city of Colorado Springs, and not otherwise."

V. That the court erred in ordering and adjudging, in said decree, that the operation of plaintiff's switching crews and its own switching engines in the yards of the defendant company shall be "under the sole and absolute supervision, direction and control of the yardmaster or other properly constituted officer or agent of the defendant."

VI. That the court erred in ordering and adjudging in said decree that the words "shops at Burnham," used in section 1 of article 1 of said contract, "includes all lands used or procured for shop purposes and appurtenant to the shops located at Burnham on the west side of defendant's main line of railway bounded on the north by the north line of the parcel of land known as the Burlingame tract and on the south by the north line of the parcel of land known as the Bailey tract (being the north line of Vasquez street), containing sixty acres, more or less, together with all buildings, tracks and other improvements or appurtenances thereon situated, and that the complainant has no interest in or right to the use of any portion of said premises" so described.

VII. That the court erred in ordering and adjudging, in said decree, that the plaintiff herein should pay one-half of all costs taxed or to be taxed in said cause.

VIII. That the court erred in omitting and refusing to order and adjudge, in said decree, that the operation of engine crews and switch engines by the plaintiff in the yards of the defendant should be under the "immediate direction of the superintendent or other officer duly authorized of the Denver Company," instead of "under the sole and absolute supervision, direction and control of such officer."

IX. That the court erred in omitting and refusing to order and adjudge, in said final decree, that the defendant should refrain from refusing to discharge any of its employes engaged in the operation of any part of the railway jointly occupied and used under said contract, upon the demand by the plaintiff that such employe be removed from that portion of said line.

X. The court erred in refusing to order and adjudge, in said decree, a specific performance by the defendant of the several promises, covenants and agreements in said contract set out to be by it performed.

And because of each and every of said several errors plaintiff prays that said decree be reversed and that a decree in accordance with the law and the facts be entered under the order of this court.

THOS. F. WITHROW,
THOMAS S. WRIGHT,
A. E. PATTISON,
For The Chicago, Rock Island and Pacific Railway Company.

FILED
OCT 16 1891

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1891.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Complainant and Appellant,
vs.
THE DENVER AND RIO GRANDE RAILROAD COMPANY,
Defendant and Appellee.

No. ~~1695~~ 1095
APPEAL.

THE DENVER AND RIO GRANDE RAILROAD COMPANY,
Defendant and Cross-Appellant,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Complainant and Cross-Appellee.

No. 1711. 1109
CROSS APPEAL.

Appeal and Cross Appeal from the Circuit Court of the United States, District of Colorado.

ARGUMENT FOR THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, PLAINTIFF AND APPELLANT.

THOMAS F. WITHROW,
THOMAS S. WRIGHT AND
A. E. PATTISON,
FOR PLAINTIFF AND APPELLANT.

IN THE

Supreme Court of the United States.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Complainant and Appellant,
vs.
THE DENVER AND RIO GRANDE RAILROAD COMPANY,
Defendant and Appellee.
APPEAL.

THE DENVER AND RIO GRANDE RAILROAD COMPANY,
Defendant and Cross-Appellant,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Complainant and Cross-Appellee.
CROSS APPEAL.

Appeal and Cross Appeal from the Circuit Court of the United States, District of Colorado.

Argument for the Plaintiff and Appellant, The Chicago, Rock Island and Pacific Railway Company.

I.

The plaintiff affirms and the defendant denies:

1. *That the lease of the original Kansas Company to the St. Joseph, the consolidation of the original Kansas and the Chicago Companies, the deed of the St. Joseph to the Rock Island and the assignment of leases by the Kansas and St. Joseph Companies to the Rock Island invested the last named Company with all of the rights and privileges of the Chicago Company under the contract of February 15th, 1888.*

2. *That the defendant will not be permitted under the facts developed by the testimony presented in this record to dispute the title of the plaintiff.*

ROCK ISLAND'S TITLE.

Opinion of Mr. Justice MILLER. Rec., p. 80.

Mr. Justice MILLER held, "that the Chicago Company, "that is, the original contracting company, did convey or "assign its interest to The Chicago, Rock Island and Pa- "cific Railway Company by virtue of sales and consolida- "tion and lease of its property." He stated further, that if there was any doubt as to this, it would be "removed, "for the purpose of this suit at all events," by the fact "that the Denver Company "has permitted" the Rock Island Company, "the present plaintiff, to exercise all the "rights granted by this contract to the Chicago Com- "pany, and does permit it to exercise them to this day, "and has never controverted their right to exercise such "rights as belonged to the original contracting parties."

HALLETT, D. J., expressed no opinion, but apparently assumed that the plaintiff had a sufficient title.

Opinion CALDWELL, C. J. Rec., p. 1259.

CALDWELL, C. J., made no reference to the question in his opinion, but by his decree declared that, "The Chica- "go, Rock Island and Pacific Railway Company, as the "successor in trust of the Chicago, Rock Island and Col- "orado Railway Company, has the right to operate its "trains over the line of the defendant company, described "in said contract, with all the rights, and subject to all "the limitations in said contract granted or reserved to "the said The Chicago, Rock Island and Colorado Rail- "way Company."

Rec., p. 1261.

From this portion of the decree the defendant alone appeals.

The case was considered by Mr. Justice MILLER on the original pleadings. Additional pleadings have since been filed and a large mass of testimony incorporated in the record. The complainant affirms, first that it has a complete paper title: second, that if this is not true the defendant will not now be permitted to question its title.

(1.) *As to the paper title.*

It is expressly admitted by the amended answer of defendant that the "consolidated corporation * * *

Abst., p. 25.

"succeeded to and became vested with all the property

"and property rights, powers, franchises and privileges of said two constituent companies, including the contract between the said Chicago, Rock Island and Colorado Railway Company and defendant, hereinbefore mentioned, and thereupon entered into the enjoyment and possession of the same."

ROCK ISLAND'S TITLE.

This concludes all discussion as to the effect of the consolidation upon the rights of the consolidated company concerning the contract. The allegation that the Kansas Company had no power under its charter to acquire or operate a railway beyond the limits of the States of Kansas and Nebraska does not modify this admission. The learned counsel who drew the amended answer overlooked the fact that such power is expressly granted, by a statute of the State of Kansas, to all Kansas corporations.

See copy of Statutes appended hereto.

The next question is, what effect did this have upon the rights of the St. Joseph Company? The lease of May 15, 1886, demised to it all of the railway of the lessor and all *extensions thereof*, "all leasehold interests in "other railroads and all traffic and running arrangements "with other railway companies." It has been suggested that the Colorado railway was not an *extension* of the railway of the original Kansas Company, and that the leasehold interests of *that* company only were passed, not those of the consolidated corporation. Without controverting the suggestion as the statement of a general proposition, we affirm that the Colorado railway was an extension of the Kansas railway, and was so recognized by the parties to the consolidation. The railway which the consolidated company acquired was the railway of the original Kansas Company and none other. At that time the Chicago Company did not own a foot of constructed railway. The only railway which the consolidated company owned immediately after it was organized was the one demised to the St. Joseph Company with the "extensions" and "leasehold interests." The lease provided that it "shall remain in full force and be obliga-

Abst., p. 3.

Abst., pp. 30-36.

ROCK ISLAND'S TITLE.

"tory upon the parties, *their successors and assigns*, and "shall attach and run with the railway and appurtenant "property and franchises" of the Kansas Company.[1] The Chicago Company not only did not have, when the consolidation was made, a foot of railway, but it was not possessed of a dollar which could be expended in the construction of one. The articles of consolidation provided that the mortgage which the Kansas Company had executed on the 15th day of May, 1886, should be a lien upon the property of the consolidated company thereafter "constructed or acquired, to the same extent it would be "if the same were constructed or acquired by the Kansas "Company before the execution of this agreement;" and that it should have "like force and effect as to all bonds "which have been or may hereafter be issued thereun-"der." With the proceeds of bonds issued under the mortgage of the original Kansas Company the railway in Colorado was constructed. The articles also provided that the "lease executed by the Kansas Company to the "St. Joseph and Iowa Railroad Company, bearing date "the 15th day of May, in the year 1886, shall extend to "and embrace all property which is now, or shall here-"after be constructed, or in any manner acquired by the "consolidated corporation, in the States of Kansas and "Colorado, and in other states and territories, as "fully and to the same extent as if embraced by "particular description in said contract of lease." It was the evident intention of the parties that the railway to be constructed with the proceeds of bonds secured by the mortgage of the original Kansas Company, over which the lease would extend, should be

Abst., pp. 36, 37.

Abst., p. 32.

Abst., p. 37.

[1] Article III. section 11, of the lease of the Kansas Company to the St. Joseph Company was, by oversight, omitted from the abstract. It is as follows:

"SEC. 11. These articles shall remain in full force and be obligatory upon the parties, their successors and assigns, and shall attach and run with the railway and appurtenant property and franchises of the party of the first part."

The Kansas Company was the party of the first part. Rec., 175, fol. 63.

made as an extension of the railway which that company first demised to the St. Joseph and then conveyed to the consolidated corporation with the lease attached. It has been suggested that "the Chicago Company's line is no "more an extension of the lines of the old Kansas Com- "pany than are the lines of the old Kansas Company an "'extension' of the lines of the Chicago Company." The Kansas Company owned several hundred miles of constructed railway, which was being operated by its lessee—the Chicago Company had a corporate existence and a route located for a short distance west of the state line. To call a constructed and operated railway an "extension" of a franchise and a partially located route is not the equivalent of calling the railway thereafter constructed on the partially located route an extension of the existing railway with which it connects. ROCK ISLAND'S TITLE.

The railway which the consolidated company owned when the consolidation was completed was demised by a contract which covered all extensions thereof and all leasehold "interests in other railways." This contract ran with the railway, and covered all extensions made by the original lessor or its successors, and that railway was extended by the consolidated company. To secure the extension of the lease over the new railroad no new meeting or assent by the St. Joseph Company was needed.

The paper title of the St. Joseph has been conveyed to the Rock Island by both the consolidated and the St. Joseph companies, and is complete. If it was vitiated by any technical defect, no one could attack it on that ground except the state. Morowitz Corps., Secs. 634, 675, 678.

(2.) *As to the facts which conclude the defendant.*

The execution of the contract of February 15, 1888, the articles of incorporation of the Chicago Company and the articles of consolidation between the Kansas companies and the Chicago Company was under the supervision of Hon. Edward O. Wolcott, then and now the general counsel of the Denver Company. That he Abst., p. 26, et seq.

ROCK ISLAND'S TITLE.

was employed by Mr. Cable, upon the solicitation of David H. Moffat, the president of the Denver Company, is one of the undisputed facts in this case. He alleges that he told Mr. Cable, when he was retained, that he could accept no service which required the performance of duties inconsistent with those arising from his relations to the Denver Company. Such protest was unnecessary. It may be safely assumed that Mr. Cable would not have desired his services if he had supposed him capable of infidelity to a client. That he was willing to trust this important work to the general counsel of the Denver Company shows, as does all that followed, that he desired to conceal nothing from that company.

Abst., pp. 28-45, 103, 104.

Mr. Wolcott, in his first interview with the president and general solicitor of the Rock Island Company, insisted that the Colorado corporation should bear a name which would tell the people of that state, that the Chicago, Rock Island and Pacific Company was the real party; and the name, "Chicago, Rock Island and Colorado Railway Company," was accordingly adopted. He knew then, as he declared in writing after his work was finished, that it related to the "Colorado end of the Rock "Island Railroad." It was known to and proclaimed by the newspapers in Denver. It was the subject of discussion in the Denver Board of Trade. That it was known to President Moffat, General Manager Smith and other officers of the Denver Company, is conclusively inferrable from the presumption that General Counsel Wolcott kept them advised of all information in his possession pertinent to the interests of that company, around which was thrown no injunction of secrecy; from the fact that they are intelligent business men who are presumed to have knowledge of matters generally understood in the community in which they reside, affecting the interests of a great corporation whose affairs are under their direction, and from many statements contained in the testimony in this record.

Abst., pp. 3, 39.

Abst., p. 39.

Mr. Smith testifies that one of the inducements

to the contract, was "the prospective increase of "wheelage to be given us by the *Rock Island Com-* "*pany;*" that "it was the understanding before the "agreement was executed, that the Rio Grande Com- "pany was to furnish the power and crews and "pay them, carry them on their own pay rolls, and "charge the *Rock Island Company*, or The Chicago "Company, a proportionate part of the expense based on "wheelage;" that Mr. Cable told him "very many "times" that "the *Rock Island* would come exclusively "and only by way of Colorado Springs to Denver;" that Mr. Cable "put in words that led me to believe, and "led others who were with me to believe, and Mr. Mof- "fat particularly, that all business *the Rock Island* could "control would be delivered to us at Colorado Springs." True, Mr. Smith, Mr. Wolcott, Mr. Vaile and Mr. Moffat claim that while they understood that the promoters of the Chicago Company were officers of the Rock Island, their transactions were exclusively with the Chicago Company and without regard to the Rock Island. In the light of all of the testimony, this position is not candid—is not even ingenious. They all understood, as Mr. Wolcott did, when he wrote his last letter to Mr. Cable—that all that they did was for "the Colorado end of the "Rock Island Railroad."

Abst., pp. 100, 101.

Abst., p. 39.

The Rock Island entered into open possession early in 1889, and its right was not disputed until the answer was filed in this cause. Even in the original cross-bill, the Denver Company prayed against the complainant a specific performance of the contract as it interprets it.

Abst., pp. 13, 41.

In view of this history, it will not be permitted to dispute, in a court of equity, the claims of the Rock Island Company under the contract. In a proper case, such an objection might be urged by a stockholder in one of the constituent companies—but what stockholder can complain in this? The holder of every certificate of stock—every person who is entitled to stock—in the Chicago Company, voted for the consolidation which extended the lease over

ROCK ISLAND'S TITLE.

the railway to be constructed or acquired in Colorado. Would any court of equity listen to a complaint by Mr. Vaile and his associate employes of Edward O. Wolcott? It has been urged that the fact that the stock-holders of the constituent companies have not surrendered the certificates issued by such company in exchange for certificates of the consolidated company, counteracts the acquiesence which would otherwise be inferred from their action. By what process it could thus operate has never been explained. They were entitled to certificates from the consolidated company. In what way can the vote cast for consolidation be affected by the fact that they have not exchanged their old certificates for new ones—especially in view of the rule established both by law and the articles of consolidation in this case, that the possession of certificates is not necessary to the exercise of their rights as stockholders in the consolidated corporation? If all shareholders are concluded no one can make any question but the state. This rule has been settled as to the policy of the state of Colorado by this court, by a decision which is in full accord with the current of authority.

Fritz v. *Palmer*, 132 U. S. Rep., 282.

II.

THE EXCEPTIONS IN THE DESCRIPTION OF THE PROPERTY DEMISED, AND THE LIMITATIONS UPON ITS USE.

(1.) *The exceptions in the description.*

1. While the parties are agreed that the "shops at "Burnham" are excepted from the description of the property, the plaintiff insists that the phrase "excluding the "shops at Burnham" excluded only the buildings and other structures, and the land on which they are situated, used exclusively in manufacturing and repairing railway appliances; and the defendant contends that it excludes the tract of land at Burnham alleged to have been purchased for shop purposes, as well as that covered by the shop structures, and particularly that it excludes certain tracks known

EXCEPTIONS—SHOPS.

as the "coach tracks" which had been used for cleaning passenger coaches operated by both parties on said railway, and a track known as the "wye" track which was constructed after the contract was executed, and which is used for turning cars, engines and trains in the operation of said line.

Opinion CALDWELL, C. J. Rec., p. 1255.

The opinion and decree of the Circuit court on the final hearing sustains the contention of the defendant. It ordered and adjudged that "the shops at Burnham" included "all lands used *or procured* for shop purposes and appurtenant to the shops at Burnham, on the west side of defendant's main line of railway, bounded on the north by the north line of the parcel of land known as the "Burlingame tract," and on the south by the parcel of land known as the "Bailey tract," "(being the north "line of Vasquez street), containing sixty acres, more or "less, together with all buildings, tracks and improve-"ments or appurtenances thereon situated; and that com-"plainant has no interest in or right to the use of any "portion of said premises hereinabove described."

Decree, Rec., p. 1260.

From this the complainant appeals. But the decree further orders that:

"The complainant shall not be excluded from the use of the Wye track at Burnham for the turning of its engines, cars and trains, so long as it shall continue to pay for the use thereof, interest at the rate of two and one-half per cent. per annum on the cost of its construction; unless and until the defendant shall provide at Denver another Wye track for the turning of such engines, cars and trains."

From this order defendant appeals.

It is further ordered by the decree, that:

"The parties shall set apart a track at Denver on which the complainant shall have the right to clean its cars, and if no existing track can be conveniently devoted to that purpose, the defendant shall construct and equip a track therefor at the joint expense of the parties plaintiff and defendant."

From this order the defendant appeals.

Abst., pp. 48-52.

Preliminary to the discussion of the questions raised upon this portion of the decree, we call the attention of the court to the maps which were furnished in Decem-

EXCEPTIONS—SHOPS.

ber, 1887, by R. E. Ricker, general superintendent and chief engineer of the Denver Company in compliance with the order of S. T. Smith, general manager, to H. A. Parker, chief engineer of the Rock Island and vice-president of the Kansas Company, for the purpose of showing the terminal facilities and property of the Denver Company owned at Denver, which includes Burnham. Two of these maps are produced in testimony by R. R. Cable, and marked No. 1 and No. 2. Map No. 1 showed the property which constituted the operating yard near Cherry creek in the city of Denver. The boundaries of the different blocks embraced in the yard are marked by red lines and the contents of each are stated on the face of the block; the numbers and contents are also tabulated, and the quantity of each marked on the face of the plat thereof. The aggregate quantity, excluding the portion outside of the blocks and in the streets in which tracks are laid, was 22.42 acres. The streets in which tracks were laid aggregate 10.62 acres—making in all 33.04 acres. The map No. 2 shows property owned by the company at Denver. The lines of the different parcels embraced therein are marked in the same manner and a like table is written upon the face of the map giving a list of the several parcels, and stating the aggregate to be 91.38 acres. Excluding the streets the aggregate of the property owned by the company upon which terminal facilities were established, was 113.78 acres—including streets 124.40 acres. Mr. S. T. Smith, the general manager, testifies that he estimated the value of property at Denver covered by the lease at $700,000. The court finds upon his testimony, that of the 113.78 acres constituting the entire Denver property, 60 acres were reserved as "its shops at Burnham." This places the entire valuation upon 53.78 acres—an average of over $13,000 per acre.

Rec., p. 1236.

It is declared in the opinion of the court, upon which this decree is founded, that the phrase, "the shops at Burnham," is not, "in the connection in which it is used in

"this contract and in the light of the surrounding condi-
"tions and circumstances which must be taken into con-
"sideration in construing the contract, a term of art that
"requires the testimony of experts to explain its meaning
"to the court."

1. We propose to examine first the "surrounding "conditions and circumstances" in the "light" of which the court interpreted section 1, article 1, of the contract. These, as found by the court, are as follows:

(1.) When the contract was executed the Denver Company owned and was operating 1,500 miles of railway; the shops at Burnham was the place at which it manufactured the greater portion of its machinery and kept its principal stores of material and equipment; and for such a line extensive shops are necessary.

(2.) The lands used for shops at Burnham originally comprised about forty acres, which were found inadequate, and additional grounds were purchased, and at the date of the contract had been set apart for exclusive use for shop purposes. The shop grounds thus set apart amounted to about sixty acres.

(3.) A map of defendant's Denver property was before the parties during the negotiations that led up to the contract on which the shop grounds were stated to embrace about forty acres; and that was the extent of them when the map was made, but by subsequent purchases they have been extended, until at the date of the contract they embraced sixty acres.

(4.) It is "highly probable the boundaries of the "shop grounds at Burnham, as they stood at the date of "the contract were pointed out, or outlined, on one or "more of the maps which the officers of both companies "had before them at or before the time the contract was "entered into."

(5.) "It is quite certain that both parties understood "that the expression 'the shops at Burnham' was not to "be restricted to the shop buildings only."

EXCEPTIONS—SHOPS.

It may be profitable to examine these "findings" in the light of the evidence.

Abst., pp. 3, 4.

The first "condition and circumstance" is established by the testimony, which shows also that the defendant company had other shops at Pueblo, a point of junction of its principal lines and 120 miles nearer than Denver to the tracks upon which much the larger proportion of its rolling stock is used. It is proved that sixty-two per cent. of the traffic received and sent from defendant's yard at Pueblo is not hauled a foot over the line between Pueblo and Denver. This indicates that over two-thirds of the repairing work of the company is done at Pueblo. The Pueblo shops should care for all equipment used west and south of that place, and for a considerable portion of that used between Denver and Pueblo.

Abst., p. 168.

The second "condition and circumstance," as stated, is not in accord with the testimony. The learned judge evidently referred to the forty acres marked "shop grounds," on the map furnished by the Denver Company in December, 1887, to show "the area of our terminal "facilities at Denver and Pueblo," to which more particular reference will be presently made. While these grounds were called "shop grounds," they were not then and have never been exclusively used for shop purposes. When the contract was made, five and one-half acres of this tract was on the east side of the main line, and there is no pretense that it has ever been used for shop purposes. At that time "main tracks" A, B, D, E and N run through the forty acres. On the 10th day of May, 1887, about one year before this contract became obligatory, a large portion of the property embraced in this territory was returned for taxation as "right of way for "main tracks and sidings," to the end that it should be assessed by the State Board of Equalization as property used "exclusively in the operation of the main line" in the state. Many tracks upon this forty acres have always been used for standing cars between their arrival and

Abst., pp. 48-52.

Abst., p. 50.

Abst., pp. 53, 54.

Abst., p. 82.

departure, as parts of trains used in the operation of the line. Neither is is it true that the lands purchased in addition to this forty acres were set apart for exclusive use for shop purposes, as we will endeavor to show presently.

EXCEPTIONS SHOPS.

As to the third "condition and circumstance:" It is true, as found by the court below "that a map of de- "fendant's Denver property was before the parties dur- "ing the negotiations which led up to the contract, on which the parcel marked "shop grounds," was stated to embrace about "forty acres;" and it is also true that "that was the extent" within which such grounds were limited, "when the map was made." But this was in Decemher, 1887. It is not only *not* true that "by subse- "quent purchases they have been extended until at the "date of the contract they embraced sixty acres," *but there is not in this extended record one syllable of testimony which tends in the slightest degree, to sustain the statement that any purchase was made after the map referred to was made.* The only map showing that the shop grounds consisted of forty acres, which any one claims was before the parties during the negotiations, was the one sent by Ricker to Parker, December 21st, 1887; and there is no claim in the record, outside of the opinion, that any of the land embraced in the description set out in the decree was purchased after that date. All of the maps which it is claimed were exhibited were "blue prints" of a tracing made in 1884, four years before this contract was made, and when the tracing was made the company owned all of the land covered by the decree except what is known as the "Burlingame tract," which was acquired in 1887, and returned by the company for taxation as early as 1888.

Abst., p. 58.

Abst., p. 57 and map appended.

As to the fourth "condition and circumstance," instead of its being "highly probable" that any maps were before the parties when the negotiations were in progress, or when the contract was concluded, on which was out-

EXCEPTIONS—SHOPS.

lined the boundaries of the shop grounds as declared by the decree, the contrary is established by the overwhelming preponderance of the testimony, as we will now endeavor to show.

Abst., p. 55.

Mr. S. T. Smith testified that at some time in some one of the several conversations which he had with Mr. Cable, a blue print of the tracing of 1884 was before them; that Mr. Cable asked where the "dividing line was between "the right of way and the property coming under the "the agreement and the shop grounds;" that he drew a line with a red pencil on the blue print from a point near the north-east corner of the Burlingame tract to a connection with the right of way near the north-east corner of the Bailey tract. This line was a short distance west of the main track, and was irregular in its course. It is shown by the green line on the map appended to to the abstract. Mr. Smith describes it as "a sort of off-"hand line made with a red pencil—not a well defined "line; it was just off-hand, without any rule or idea of "making any line clear across—it was really to illustrate "in the conversation, what was meant and intended, and "that he told Mr. Cable that everything east of this line "described, was to go into the valuation and be consid-"ered as joint property and worked under joint interests "—west of that was to be considered shop grounds, and "was not to be included in the valuation."

Abst., p. 57.

He says also, that this conversation, when this line was marked on the blue print, may have been as early as November, 1887, but as to this he is not certain; that Mr. Moffat and Mr. Cable were present at all of the interviews, and Mr. Low and Mr. Parker were present at one.

Abst., p. 58.

Mr. Cable's affidavit is in the record, by stipulation to be considered as a deposition. He contradicts Mr. Smith point blank. Mr. Smith asserts that certain things were said, and Mr. Cable asserts quite as positively that nothing of the kind was said; and he is fully corroborated by Mr. Low. It is not a case of one witness remembering

affirmatively what was said, against another having no recollection upon the subject.

EXCEPTIONS—SHOPS.

Mr. Moffat, the president of the Denver Company, had conducted a considerable portion of the negotiations which preceded the contract, and was certainly present. His affidavit, made after Mr. Cable's, was on file, is in the record as a deposition. The tone of this affidavit shows unmistakably that while the witness would not knowingly misstate transactions in the interest of the company of which he was the principal officer, he was exceedingly anxious to remember everything which would be to its advantage in the consideration of the case. He "is of the *impression* that Mr. Cable was present at" some of the interviews between him, the witness, and Mr. Smith, "but as to this he is not sufficiently certain to testify "under oath." He does not have even an "impression" as to the production or marking of any map by Mr. Smith. As the matter now stands, Mr. Smith is not supported by Mr. Moffat, and is contradicted flatly by Mr. Cable, who is sustained by Mr. Low.

Abst., p. 58.

The learned counsel for the defendant attempt to support Mr. Smith's statements by the suggestion that he "is entitled to greater credit (than Mr. Cable) first, because he testifies to an affirmative fact which may have passed from the memory of Mr. Cable, but to which Mr. Smith could not honestly testify unless it had actually existed." This is substantially repeated in the opinion of the court on the final hearing, that "some witnesses "have probably forgotten what others recollect."

The reply to this is clearly stated by one of the most philosophical of the text writers:

"It should be added, however, that the weight to be attached to the negative witness depends upon the exhaustiveness of his observation; and that the mere fact of its negativeness does not exclude it as testimony. Put an intelligent and credible witness in a small chamber, open throughout to his scrutiny, and his testimony that in that chamber, at a given time, an event did not occur which could not have occurred without his observation, is entitled to the same weight as that of a witness who, equally intelligent and credible, could swear to the occurrence

Whart. Ev., Sec. 415.

EXCEPTIONS—SHOPS.

of the event at the same time. A negative witness also, whose attention is concentrated on a particular point, may outweigh an affirmative witness whose attention has not been so concentrated.

* * * * *

—Sec. 416.

Supposing, however, that the witnesses on the one side are equal in intelligence, opportunities, memory and truthfulness, to the witnesses on the other side, what rule is to be followed? Indubitably, in such cases, the decision should follow the greater number of witnesses, when the disproportion is marked. Two witnesses, all other things being equal, are less likely to be mistaken than one."

The court will not doubt, after an examination of this record, that R. R. Cable and M. A. Low are quite as intelligent as S. T. Smith. Of all the men connected with this negotiation Mr. Cable was the one whose attention was most concentrated upon what was being done. He alone represented the Rock Island interest in the negotiations. Mr. Low and Mr. Withrow were his legal advisers, but he alone decided. The Denver Company was represented by Mr. Moffat, Mr. Smith, Mr. Wolcott and by the board in New York—sometimes by one and at other times by some one or more of the others. Again, he was one of the parties to this conversation. All that was said and done was "open "throughout to his scrutiny:" nothing could have occurred "without his observation." There is no halting in either his or Mr. Low's testimony—they do not say that they do not remember: they do affirm clearly, positively and sharply that the transaction did not occur as stated by Mr. Smith.

And what is there which entitles Mr. Smith's recollection to greater weight than the positive statement of two witnesses, equally intelligent and having the same opportunities for knowledge? He cannot fix the time when the interview occurred more definitely than by saying that it was between November and February. He is not certain that the maps furnished by Ricker and produced by Cable were not exhibited at the interview when the valuation was fixed, and he does not pretend to be able to state the language used by any of the parties in any of these conversations. The learned counsel for

Abst. p. 57.

the defendant insist that his statements are "in accord- "ance with the reason of the thing, as shown by the sit- "uation of the parties, the title of the map under consid- "eration, and the condition of the property in relation "to lines of railroad and the terminal facilities at Den- "ver."

EXCEPTIONS SHOPS.
Defendant's Argument in Cir. Ct., p. 35.

It may be well to see what effect the light suggested will have upon Mr. Smith's testimony and upon the construction which defendant and the Circuit court have placed upon section 1, article 1, of the contract. The title of the map was as follows: "A new map of the "Denver & Rio Grande railway shops at Burnham, near "Denver, Colorado, showing all tracks, buildings and "other improvements. Compiled from special surveys "made under the direction of Chief Engineer J. A. Mc- "Murtrie, by H. H. Rogers, Asst. Engr. Survey be- "gan February 1st., finished February 29th, 1884." This title was on the blue print sent by Ricker to Parker, and produced by Cable, and on blue prints which Smith says he exhibited to Cable and on which he made "the "off-hand line with a red pencil." It was on both of these, because it was on the tracing made in 1884. The learned counsel for defendant insist that this "must have "put Mr. Cable and his associates upon inquiry as to "what was meant by the shops at Burnham," and that "the evidence of defendant shows that such inquiry was "made and definitely and clearly answered." The map sent by Ricker to Parker had the "shop grounds" distinctly marked with a notation of the contents thereof. It was evident that the boundary line and the areas were marked on the blue print and not on the original tracing, and that they had been made in the performance of Mr. Smith's assurance that a "statement showing the areas "of our terminal facilities at Denver and Pueblo" should be furnished "at the earliest practicable date." Would such a blue print, furnished under such conditions and circumstances, excite a spirit of inquiry?

Map—Title.
Abst., p. 50.

Abst., p. 52.

"Shop grounds."

But assume that another blue print was exhibited, on

Abst., p. 52.

EXCEPTIONS—SHOPS.

which the boundaries and quantities were not so marked. Did this impose any duty upon Mr. Cable to make inquiry? The title was on one end of each of the "blue prints" mentioned, and at the other was a tabular statement of "alignment notes of main track hereon shown"; and the main tracks "hereon shown" were the "main line" and "main tracks A, B, D, E and N," which divided into many parts the property which it is now claimed constituted "the shops." All of these main tracks were west from the "off-hand line made with a red pencil" by Mr. Smith. If the words "new shops" in the title should have prompted inquiry on the part of Mr. Cable, the location of these "main tracks" through the so-called "shop grounds" should have satisfied him that the "shops" did not cover the entire sixty or even the entire forty acres.

"Main tracks"

In considering the corroboration of Mr. Smith "by the "reason of the thing" it may be well to examine some additional "conditions and circumstances" developed by this record.

Returns for taxation.

See statutes set out in the appendix.

It is the duty of the State Board of Equalization of the State of Colorado to assess all the property in said state belonging to railway corporations, except lots or parcels of real estate owned by the road within each county, and improvements thereon, except depots, *machine shops* and other improved property connected with such road and located in any county; which shall be taxed in the county where situate.

Abst., pp. 52, 54, 61, 65.

In 1887, 1888 and 1889, the company was required to make, by some general officer, a report concerning its property which would enable the board to make an assessment which would include "the right of way, road-"bed, bridges, culverts, rolling stock, depots, station "grounds, buildings and all other property, real and per-"sonal, *exclusively used in the operation of such railway*." The assessment thus made to cover all property "ex-"clusively used in the operation of this railway" was by a valuation placed upon the main track in the state, di-

vided among the counties through which the road ran on the basis of mileage.

EXCEPTIONS—SHOPS. *Returns for taxation.*

The law requires that the property excepted from assessment by the State Board of Equalization shall be taxed in the county where situated. It was returned to the county assessor, as other property was returned for assessment, by a general officer of the company in accordance with forms prescribed for that purpose by the county commissioners.

Those made for 1887, 1888, and 1889, were so arranged as to show what property had been returned to the state board for assessment as the property "used exclusively in the operation of the railway," and did show that right of way for "main tracks and sidings" in every parcel west of the "off-hand line" had been returned to the State Board of Equalization, for assessment as property "used exclusively in the operation of the main line." In 1889 a larger proportion of the alleged "shops" was returned as "right of way" than in the preceding years.

It is claimed that notwithstanding the fact that Mr. Cable was in possession of the "statement showing the area of our terminal facilities at Denver and Pueblo," furnished by Ricker in compliance with the direction of the general manager, and that this return was on file in a public office at Arapahoe county, Mr. Smith made, in the presence of Mr. Cable, the alleged "off-hand line," on a map which showed upon its face that the land which he claimed as shop grounds and shop grounds only, was cut into many parcels by many main tracks. And more, we are assured by the learned counsel that this is in "accordance with the reason of the thing"—to which the Circuit Court responds—"it is highly probable." The opinion thus disposes of the facts concerning the return for taxation:

Opinion CALDWELL, C. J. Rec., p. 1228.

"It seems that a subordinate agent of the defendant, in listing the property for taxation, distinguished between shops and yards, and that the plaintiff has been charged with and paid one-half of the taxes on some portion of the shop grounds. The listing was done in conformity, or supposed conformity, to the reve-

EXCEPTIONS—SHOPS. *Returns for taxation.*

nue laws of Colorado, and had no reference to the rights of the parties under the contract, of which the agent who attended to the taxes had no knowledge. No estoppel arises from anything which took place about the taxes."

Abst., pp. 6, 65 and 66.

The contract requires the plaintiff to pay one-half of the taxes which have been assessed under these returns—they have been paid for one year—the others remaining unpaid because coupled with disputed items in suspended bills.

That the returns were made by a "subordinate" is not adequate. This "subordinate" was the representative of the defendant who had charge of its taxes. He was the "land and tax agent" of the defendant. Clearly he was in control of his department, not a "subordinate," but a superior to whose judgment and management was confided the important subject of taxation.

The same "subordinate" made like reports for three years in succession, and it was the duty of his superior, the general manager, to know what was being done concerning the taxes levied upon a railroad of a magnitude which required sixty acres of "shops." The Denver company has availed and is availing itself of the benefits resulting from these returns, and it insists that this complainant shall bear one-half the burdens they impose upon it. The law of estoppel may not apply—considerations of common honesty do. The statements made in the returns, under the oath of this officer, are in accordance with the facts spread upon the face of this map with which the general manager must have been familiar. It matters not whether the agent knew or did not know anything of the contract. It was his duty to know the difference between "shop grounds" and land occupied as "right of way for main tracks and sidings" used exclusively in the operation of the railway.

And there are other "conditions and circumstances" which may be profitably considered in connection with this matter.

Abst., p. 33.

The contract of February 15, 1888, was signed by the officers of both companies, under the directions of their

respective boards of directors on the 8th day of March, in that year. It did not become obligatory upon either party, however, until it was ratified and approved by the stockholders of each; and this was done by the Denver Company on the 22d day of May, and by the Chicago Company on the 29th. At that time the construction of additional operating yards at Burnham was under consideration in the offices of the Denver Company. A plan for a yard to be used for operating purposes was made in the engineer's office, and a copy of it is in testimony. It bears date June 13, 1888, probably the day on which it was completed, just two weeks after the contract was approved by the stockholders of the Chicago Company, and three weeks after its approval by those of the Denver Company. A glance at the map will convince the court that it was the result of much study by the engineers who designed and drafted it. It covers a portion of the parcel marked, "shop grounds," on the map which Ricker sent to Mr. Parker and a large territory on the west side of, and including the right of way extending from said "shop grounds" to Sante Fe avenue. The boundaries of the proposed yard are marked yellow on the map appended to the abstract.

EXCEPTIONS—SHOPS. *"Proposed Yard."*

Abst., p. 35.

Abst., p. 62.

That this is a plan for an operating yard is not disputed, and that it would cover about thirty acres of land which Mr. Smith says he regarded as a part of the shops at the time, cannot be denied. Did the officers of the Denver Company regard this as "shops" property at the time they were arranging for its use in operating the railway? That its construction involved the acquisition of another large tract of land not owned by the Denver Company is apparent. It is also certain that in November 1888, during the month in which the St. Joseph Company commenced the operation of the "Colorado end of the Rock Island railroad," Mr. Smith and Mr. Cable had a conference in regard to the proposed yard, in the presence of Mr. Low. As to what then occurred Mr. Smith is again contradicted by Mr.

EXCEPTIONS—SHOPS.
"Proposed yard."

Cable and Mr. Low. Cable and Low assert that he proposed the construction of this yard and the acquisition of the property south of the north line of Vasquez street, on joint account for that purpose. He admits that he did show the map to Cable and that he did desire to acquire the land, but protests that the map was exhibited, not as a plan for a joint operating yard—simply as "information" concerning a "scheme," and that he wanted to acquire the land for shop purposes. But why was this planned with so much care and labor? The proposed yard was peculiarly fitted to that location and would suit no other. Why were time and labor devoted to this plan if the property was to be held for shop use exclusively? Again, why did Mr. Smith take the trouble to impart to Mr. Cable "information" concerning a "scheme" which was never to be executed? Is it not reasonably clear that at or near the time at which Mr. Smith says he was assuring Mr. Cable that this was "shop grounds" his officers, with his knowledge and approval, were devising ways for its use, with adjacent property to be acquired, for operating purposes? The facts omitted by Mr. Smith, render very improbable the statement that he advsed Mr. Cable, when the contract was being considered, that the shops property extended to Vasquez street.

Valuation.
Abst., p. 60.

The estimated value which Mr. Smith placed upon the Denver terminals was $700,000—on the Pueblo, $200,000. The testimony does not show the acreage of the Pueblo yards, but it does show that machine shops are there located which were embraced in the valuation; that it is a junction point of branches which consist of 1,300 miles of the 1,500 miles of the Denver Company's railroad; and that for the months commencing with December, 1888, and ending with March, 1890, the cars handled in that yard averaged 744 per day. When the testimony was taken, 800 cars had been crowded, during a blockade into all of the yards at Denver.

Abst., p. 4.

Why was one appraised at $700,000 without and the other at $200,000 with the shops? This fact

EXCEPTIONS—SHOPS. *Valuation.*

alone shows that it was not understood by the representatives of the Rock Island Company that nearly one-half of the terminal property at Denver was covered by an exception which embraced not only the shop structures and the ground under them, but over half of the acreage of the property, under the pretense that although it was not used, it had been acquired for shop purposes. It is not probable that Mr. Smith would have claimed any such valuation upon fifty-three acres of land, or that if he had made such claim Mr. Cable would have assented to it.

The testimony also shows that over $104,000 have been expended in improving the Denver terminals since the contract was executed; and the officers of that company—Burns and Pike—testify that at the time their depositions were taken, the property was barely adequate to the traffic of that company alone. Is it probable that the officers of the Rock Island Company would consent to a valuation of $700,000 upon the property which could be made adequate for the traffic of the Denver Company only by an additional expenditure of over $100,000? The whole transaction shows that it was the understanding of the parties at the time that the entire 113.78 acres were embraced in the lease, save and except the structures which constituted the shops at Burnham, and the land lying under them.

Abst., p. 107.

Rules for construction.

"The decision of this question" said the court, "is not "rested on the parol testimony about the understanding of "the parties as to the extent of the grounds appurtenant to "shops;" and it held, that the term, "railroad shops," in the connection in which it is used in this contract and "in the "light of surrounding conditions and circumstances which "must be taken into consideration in construing the con-"tract, is not a term of art that requires the testimony "of experts to explain its meaning to the court."

Opinion of CALDWELL, C. J. Rec., p. 1256.

A reading of the opinion, however, creates a very marked impression that the alleged "understanding of the "parties" was among "the surrounding conditions and "circumstances" which were considered in reaching the

EXCEPTIONS—SHOPS.
Rules for construction.

interpretation of the contract adopted by the court. Let this be as it may, we propose to examine this contract in the light afforded by its own language and the well settled rules of construction.

Marshall *v.* Niles, 8 Conn., 369.

The general rule is that both the grant and the exception—in case of a lease, the demise and the exception—are to be construed most favorably to the grantee or lessee. The same rule is expressed by the statement that if a demise or exception is made in a doubtful manner, it will be construed more strongly against the lessor. It is also well settled that the "exception must be "stated and described as fully and accurately as if the "grantee were the grantor of the thing excepted."

Howard *v.* Wadsworth. 3 Me. (3 Greenleaf), 471.

It was said, by the Supreme court of Maine, in *Howard* v. *Wadsworth*:

"According to a well known rule of law, as an exception operates by way of a restriction upon the general language of a grant, *if it is in ambiguous language, it must not be enlarged by construction, but rather be construed strictly.* The demandant contends that by the exception, the grist-mill therein named, and the land on which it stood, and its appurtenances, remained in the grantors, and that the fee thereof never passed by the deed to the tenants. The tenants contend that nothing was embraced in or intended by the exception other than the mill and the right of maintaining it so long as it should stand on the premises, and the dwelling-house and sheds standing thereon. Upon a careful examination of the language of this deed, we are all satisfied that the tenants' construction is the true one. The exception relates to the mill, house and sheds then standing on the premises. The grantors repeat the word 'now' twice in describing what is excepted. Besides, there is a material variance between the language of the grant and the exception. *The grant describes the mill, privilege, etc., but the exception is silent as to privileges and appurtenances, and refers only to the mill itself.*"

The exception in this case was of "the shops at Burnham" from a description which embraced structures only, without appurtenances.

Appurtenances.

The Circuit court assumed not only that the appurteances of the shops were excepted, but that lands procured for shop purposes, and adjacent to shops are appurtenant thereto, though not actually used as appendant to them. A thing pendant or appurtenant is defined to

EXCEPTIONS—SHOPS. *Appurtenances.*

be a "thing *used with* and related to another thing more "worthy, and agreeing in its value or quality with the "thing whereunto it is dependant or appurtenant." But the *use* and the relation are essential. The term is usually applied to easements which the owner of land has in property other than that demised or conveyed.

Abst., p. 5.

Article 1, section 1, contains two descriptions—one more comprehensive than the other. "The shops at "Burnham" are excepted from one of them; or rather, the excepted structures are a part of those which without appurtenances, constitute the first description. The structures embraced in the first description, less those excepted therefrom, are the basis of the second. The first is as follows: "All of its tracks, buildings, sta-"tions, sidings and switches on and along its line of rail-"way, excluding its shops at Burnham." The court will observe that no appurtenances are embraced in this description. The proposition maintained by the learned counsel for defendant in the argument below, that by this description the land *under* the structures, and that only, passsed, may be conceded, for the purposes of this argument.

Argument of defendant in Cir. Ct., p. 31.

It was said by the learned counsel for the defendant in the Circuit court: "The granting clause does not "use the words 'lands' or 'grounds.' The use of no "lands not actually occupied by 'tracks, buildings, "stations, sidings and switches,' is conveyed except so far "as the words 'appurtenant property,' would include such "lands."

This is substantially repeated in the opinion of the court:

> "It will be observed that neither the words 'real property,' nor 'real estate,' nor 'lands,' nor 'grounds' are in any way used in describing any portion of the property conveyed by the granting clause of the contract; but these general words only, viz.: 'Its tracks, buildings, stations, sidings and switches on and along its line of railway * * * and appurtenant property.'"

We will endeavor to show presently that the words,

EXCEPTION SHOPS *Appurtenances.*

"appurtenant property," formed no part of either the description from which the exception was taken, or of the exception itself—that they are, by the opinion of the court, torn from their proper relation and placed where they do not belong. If the "general words only" were correctly quoted the exception would carry only the structures constituting the shops and the land *under* them. The "appurtenant property" goes with the description, and no "appurtenant property" is embraced in the exception.

The second description proceeds: "meaning and intending hereby to include in the description aforesaid "[that is, of the structures with the shops excluded] all "and every portion of its railway and appurtenant property between and at the points aforesaid, and all improvements and betterments thereof and additions thereto, "which may be jointly used by the parties, as hereinafter "provided." The "description aforesaid" was the description as it stood after "the shops at Burnham" were taken from the property demised—the structures described less those which constituted "the shops at Burnham." That description, the parties agree, carried the land under the structures, but no appurtenant property. If the words "appurtenant property" formed a part of the "description aforesaid," why are they repeated? Such tautology was not indulged in as to any other member of the description. The second description added to the first as it stood after the shops were excepted, all appurtenant property at and between Denver and Pueblo, and all betterments and improvements which should be thereafter made. The shops were a part of the railroad, and would have passed by the first description but for the exception—as they did at Pueblo.

If the shops were not a part of the railway, the exception was unnecessary. If they were, that which was appendant or appurtenant thereto was also a part of it. If they were a part of the property which would have been demised but for the exception, the appurtenances

of the shop were a part of it and passed by the demise, unless they were specifically execepted. Said the learned judge who delivered the opinion of the Circuit court:

"Under the terms of this grant the only ground upon which the plaintiff can claim a joint interest in the shop grounds or any other parcel of land is 'that it is appurtenant' to the thing or things specifically granted."

Opinion of CALDWELL, C. J. Rec., p. 1257.

The thing "specifically granted" was "all and every "portion of its railroad and appurtenant property." The fallacy of the position lies in the assumption that lands may be appurtenant to the "shops" which form a part of the railway without being appurtenant to the railway itself. The learned judge continues:

"It is clear that shop grounds at Burnham used for shop purposes, and not intended for any other use, are 'appurtenant' to the 'shops at Burnham' and not to the 'tracks, buildings, sidings and switches' granted to the Colorado Company."

This is the reason assigned by the Circuit court for adjudging to the exclusive use of this defendant, as will presently appear, coal-chutes and tracks which have been constructed with moneys for the use of which these parties are jointly paying interest—the land upon which the "wye" track stands, which has been and is being used exclusively for the operating purposes, coach tracks used daily by both companies in the operation of the railway, and several main tracks returned for taxation in such manner as to impose upon the plaintiff, under the contract, one-half of the burden of the taxes assessed thereon. The "only" description of the property is not, as the court assumes, "tracks, buildings, sidings, switches and "appurtenant property." These are the words of the instrument: "All and every portion of its railway and ap- "purtenant property between and at" Denver and Pueblo. But the court continues:

"And to detach the shop grounds from the shops, and declare them 'appurtenances' to the track or some building, siding or switch, in connection with which they were never designed to be used, and to the proper use of which they are not essential, would be extremely unreasonable and contrary to the plain meaning of the contract."

Opinion of CALDWELL, C. J. Rec., p. 1258.

EXCEPTIONS—SHOPS. *Appurtenances.*

Would it be "extremely unreasonable" to "declare" that so-called appurtenances to shops are appurtenant to the railway of which the shops form a part? The court evidently overlooked the fact that the "appurtenances" demised were not those attached "to the tracks, buildings, sidings or switches," but those appendant to "all "and every portion of the railway." The court further assumes that the "wye" track, the coal track, the coal-chutes and the tracks between the Burnham offices and the main line were "never designed to be used" as appurtenant to the railway demised, when the evidence shows beyond a possibility of doubt that these tracks and chutes are used exclusively in the operation of the railway, and that the coach tracks are subjected to such use every day by both parties. In the judgment of the Circuit court it "would be extremely unreasonable," to hold that the "wye" track itself, used exclusively to turn trains in the operation of a railway, side-tracks used for making and breaking up trains, coach tracks on which cars are stored between their arrival and departure in trains, and on which they are cleaned, and coal-chutes which are used exclusively in supplying engines with coal, are appurtenant to the railway.

The construction for which plaintiff contends not only applies legal principles in ascertaining the meaning of this section, but secures to each party full and ample justice. It gives to the defendant the *exclusive* use of its shop structures and the right to use any other property which it owns, jointly with complainant. There is nothing in this contract which will prevent the use of any grounds or tracks forming a part of this railway, with due regard to the rights of complainant, for shop or any other railway purposes. It is not a question of securing to the defendant the use of demised tracks, or even grounds for shop purpose. We trust the court will observe that the complainant is not seeking to exclude the defendant from any use of any portion of the railway and appurtenant property, or to interfere with the

EXCEPTIONS—SHOPS.
Appurtenances.
Abst., p. 84.

use which it may make, subject to its own right to "full, equal and joint use of the same." The coach tracks are used for storing passenger coaches while remaining in Denver between the arrival and departure in trains; and for cleaning them while standing. It is admitted by defendant's officers that this is a use in the operation of the railway, from which they seek to exclude complainant because they are sometimes used for "shop "purposes." The "wye" track is used exclusively in operating the road. It never has been appendant to or used in connection with the shops. The court declared that we have no right in it, because it is on land which was acquired and held for shop uses, though it was never used with, and has never sustained any relation to, the shops. The construction which we give to the contract gives to both parties the right to use these tracks for all railway purposes and to the defendant the exclusive right to use those which constitute the shops for shop purposes.

Abst., p. 73.

Opinion of CALDWELL, C. J.
Rec., p. 1256.

The court below found that there is a difference between a "shoe shop" and a "railroad shop"—the first is under a roof, and a considerable portion of the other is not. The logic of the opinion seems to be: 1. "Railway shops" are in part unroofed. 2. The lands at Burnham west of the main tracks and outside of the shop buildings and unroofed. Therefore these lands are a part of the shops at Burnham.

Decree.
Abst., p. 24.

The decree adjudges that we have no rights in that property west of the main track, and then directs that we shall not be excluded from the wye or coach tracks until others shall be provided for us elsewhere. If we have no *right* west of the main tracks, why are we permitted to remain in the occupation of the "wye" and coach tracks? If we are so permitted because we have rights to these, why are we compelled to surrender them and accept others instead? And if this property was "never designed to "be used" in the operation of the railway, and it is "not "essential" to said operation, why is the complainant permitted to occupy it under this lease as directed by the decree.

Abst., pp. 23 and 24.

EXCEPTIONS—SHOPS. *Decree.*

Does the description embrace all of the land lying on the west side of the main track? It embraces all "used *or procured* for shop purposes" and appurtenant to the shops "located at Burnham *on the west side of defendant's main* "*line of railway*." Do the lands used or procured for shop purposes embrace all of the lands *owned* by the defendant on the west side of the railway? A decree which settles titles and fixes boundaries should be sufficiently specific to enable a surveyor, guided by the description alone, to locate definitely the land excepted. The uncertainty which would render a grant void, has a like effect upon an exception. Said the Circuit court—the "rule of law "independently of the contract by which appurtenant "property passes, applies as well to the property excep-"ted from the grant as to that granted."

Who will hereafter determine what lands are used *or were procured* for shop purposes, and what lands were appurtenant to the shops, giving to the word "appurtenant" its legal signification? If the testimony in this record shows what lands were procured for such uses why were they not described? If it is not in the record it may or may not be locked up in the inner consciousness of witnesses who are not agreed as to their recollection of the facts—witnesses who may not be alive when the identification of the property shall be attempted.

If it be conceded, however, that this description was intended to include within the exception all of the property *owned by the defendant* lying on the west side of the main track south of the north line of the Burlingame tract, and north of the north line of Vasquez street, the character of the decree will not be improved. No witness has testified that the main line was the eastern boundary. The only testimony in the record upon which defendant can rely for the establishment of the eastern boundary, is that of Mr. S. T. Smith concerning the "off-hand line." All of this between the coal-chutes and the north-east corner of the Bailey tract was located several feet west of the main line of the railway as it was then established.

Abst., pp. 55 and 56.

EXCEPTIONS—SHOPS. *Decree.*

If this decree includes all of the land west of the main line as it then existed, it covers a considerable parcel which Mr. Smith conceded was not embraced within the exception. As to that land this decree is erroneous, even upon the assumption that Mr. Smith's evidence is not successfully contradicted and is sufficiently certain.

Abst., pp. 47 and 48.

But this is not all. It is admitted by the amended answer in this case that the coal-chutes which are west of the main line and between the north and south boundaries named in the decree have been extended and repaired, and that the cost of such extensions and repairs has been capitalized under the contract. True, this is coupled with an allegation as to a subsequent agreement, to support which no testimony has been taken. The admission is consistent only with the fact that such payment was made under the contract. That we are entitled to the "full, equal and joint possession and use," is expressly admitted, yet this decree excludes us from the property. *The defendant by its amended answer admits a right denied by the decree of the court.*

Abst., p. 83.

When this contract became obligatory, on the 29th of May, 1888, there was but one main line, so called, extending along the east side of the property at Burnham. It was with regard to this that Mr. Smith located the "off-hand line" with a red pencil. The map admitted in evidence by stipulation and marked, "T. F. W. and J. F. V., "No. 2," shows that since that time two main tracks have been established upon that portion of the property, one "east bound" and the other "west;" which signifies that all trains moved, in the operation of the road, in one direction pass over one of these tracks, while all moved in the other direction pass over the other. Now, to which one of these main tracks does this decree refer? Which was the one that was definitely established in the early part of 1888? If the eastern boundary would otherwise be certain, this would render it uncertain. According to the decree, the shops embrace the land west of the main line. The testimony shows that when the decree was entered there were two main lines. Which is the one referred to?

Abst., p. 61.

EXCEPTIONS—SHOPS. *Decree.*

But this is not the most serious difficulty with the description of the decree. Mr. S. T. Smith, general manager, admits that there are tracks west of the main track used as operating tracks by both of the parties. That which he left somewhat indefinite was made more certain by Mr. Deuel, the superintendent of the division; who says that there are four tracks between the office at Burnham and the main line, constructed for and used as operating tracks by both of the parties. Mr. Pike, the secretary of the general manager, admits that there are several tracks between the offices and the main line so used. Mr. Burns, superintendent of transportation, makes a like admission, and says that in his judgment the boundary between the property covered by the lease and the shops at Burnham is the line which connects the coal-chutes with the round-house. This round-house is west of the office. Between it and either of the "main lines," and between it and Smith's "off-hand line" there is a strip of land of considerable width upon which at least four tracks are located and jointly used, and over which access is had to the coal-chutes reconstructed at the joint expense of the parties. Nearly all of this land, and certainly all but one of the several tracks mentioned are west of the "off-hand line." Notwithstanding the fact that the cost of the reconstruction of the coal-chutes and of the construction of these tracks were made with monies which have been capitalized under the contract—moneys on which this complainant is now paying interest—the Circuit court by its decree declared, that they were all embraced within the term, "the shops at Burnham;" and "that the complainant "has no interest in or right to use any portion of the buildings, track or other improvements or appurtenances "thereon situated." The decree in the respects mentioned is directly in the teeth of the answer of the defendant and the testimony of its own officers. We will observe with interest the showing of cause why it should not for these reasons, if for no other, be reversed.

Abst., p. 76.

Abst., p. 79.

Abst., pp. 71, 72.

Abst., pp. 5 and 6.

2. The plaintiff contends that the provisions of article

III, sections 1 and 5, in connection with the last clause of article 1, section 1, excepts from the description, improvements and betterments of and additions to the railway of the Denver Company between Denver and Pueblo, made by the said Denver Company, the cost of which is not capitalized in the manner provided by the contract, and that a like exception is made of the round-houses at Denver and Pueblo by the last clause of article 1, section 1, and section III of the same article; but the defendant insists that these provisions qualify the right of use, instead of the description of the property to be used.

EXCEPTIONS—SHOPS. *Decree.*

The contract provides for the construction of additional round-houses at Pueblo and Denver for the exclusive use of the complainant, for which use it undertakes to pay five per cent. per annum upon the cost of construction. It is evident that this is an exception from the description of the property which shall be jointly used by the parties.

ROUND-HOUSES. Abst., p. 8.

The contract also provides for the construction of additional facilities by the Denver Company at Denver and South Pueblo, and secures to the Chicago Company the use of the same if it shall so elect: and provides that after such election it shall pay for such use two and one-half per cent. per annum upon the cost of construction. It seems equally clear that such improvements and betterments are excepted from the description of the property covered by the demise until such election shall be had, after which the parties are entitled to the full, equal and joint use.

FACILITIES. Abst., pp. 7, 8, 9.

The contract further provides for the construction of connecting tracks between the railways of the lessor and lessee companies and with other railways, and for other betterments, improvements and facilities, by the Chicago Company, at its own expense, securing to the Denver Company the right to elect to use the same, provided that after such election it shall pay for such use, rental at the rate of two and one-half per centum per annum upon the cost of construction. This property is excluded from the description of the property to be "fully, equally

CONNECTING TRACKS. Abst., pp. 5 and 6.

EXCEPTIONS—SHOPS.

and jointly" used by the parties until such election is had.

The round-houses at Pueblo and Denver will never be jointly used by the parties, and will never be included within the description of the property to be so used. The additional facilities, improvements and betterments constructed by each of the parties will not be jointly used until the elections provided by the contract are made, and until such elections are made they are excluded from the description. As they are made they become a part of the property described, to be fully, equally and jointly used. The words, "as hereinafter provided," in the last line of section 1, article 1, refer to those provisions which relate to the description and not to the use.

In another part of this argument we will have occasion to examine the contention of the defendant, sustained by the opinion of the Circuit court, that these provisions of the contract operate as limitations upon the use to be made of the property embraced in the description, instead of as an exception from the description of the property demised.

II. *The limitations upon the use.*

USE.

The complainant insists that it is entitled to "the full, "equal and joint possession and use" of the railway of the defendant between and at Denver and Pueblo, subject to certain limitations expressed in the contract as to the superintendence of operation, traffic to and from intermediate stations, business of express companies, the rates between stations on the line of the Denver Company, and the admission of other railway companies to the use of the property; while the defendant contends that such "full, equal and joint possession and use" is also limited to the transportation of persons and property by way of Colorado Springs.

On the final hearing, the Circuit court sustained the contention of defendant, and from this portion of the decree, the complainant appeals.

The language of article 1, section 1 is:

EXCEPTION — USE.

Abst., p. 5.

"It [the Denver Company] hereby lets the Chicago Company into the full, equal, joint and perpetual possession and use of all its tracks, buildings, stations, sidings, and switches on and along its line of railway between and including Denver and South Pueblo, excluding its shops at Burnham; meaning and intending hereby to include in the description aforesaid all and every portion of its railway and appurtenant property between and at the points aforesaid, and all improvements and betterments thereof, and additions thereto, which may be jointly used by the parties, as hereinafter provided."

1. *As to the use of the Denver terminals for traffic of complainant carried between Limon and Denver over the tracks of the Union Pacific Railway Company.*

Definitions.

This section of this contract was construed with regard to this question by Mr. Justice MILLER, in the opinion delivered in this case, and printed in this record, in which he said:

Opinion of Mr. Justice MILLER. Rec., p. 81 and 82.

"*It would be difficult to devise language more explicit and comprehensive than this.* * * * I do not agree to the construction of the contract by which the Chicago, Rock Island and Colorado Railroad Company, the original contractor, was bound to connect with this railroad only at Colorado Springs, as at all feasible; nor do I believe in any limitation upon the right of the Chicago, Rock Island and Pacific Railroad Company to use the Denver and Rio Grande railroad at all. Nor is there a limitation upon that right except that it shall be equal and joint with the Denver and Rio Grande Railroad Company, and must be so conducted as to have due regard of their rights, as well as its own; and with this view of the subject, I do not believe that the Denver Company has the right to exclude the Rock Island and Pacific Railroad Company from the use of its yards and its buildings which are appurtenant thereto and a part of the Denver and Rio Grande railroad."

The words employed to express the intention of the parties are in common use, and have a well settled and generally understood meaning. In Webster's dictionary the word, "full," is defined, "not wanting in any essential quality; complete; entire; perfect; adequate." By the new "Century" dictionary it is defined, "completely, *without reservation or qualification.*" The word "equal" is defined by the first authority, "not disagreeing in "quantity, degree, value, or the like; having the same "magnitude, dimensions, the same value; the same de-"gree or the like; neither inferior nor superior; greater

EXCEPTIONS—USE.

"nor less; better nor worse; corresponding; alike, as "equal size, persons of equal stature or talents; commod-
Inflations. "ities of equal value": and by the second, "having one "measure; the same in magnitude, quantity, degree, "amount, real value or excellence."

The words, "full and equal," as used in this section, must be considered as defining the use and possession which the lessee shall have as compared with that of the lessor. It shall not "disagree in quantity," "shall have the same magnitude," shall be "neither inferior nor superior, greater nor less" than the "possession and use" of the lessor. There is no modification of this "possession and use" stated in the section.

Housing Locomotives
Abst., pp. 5 and 6.

The covenants set out in section 3 of the same article are in harmony with this interpretation of section 1. The Denver Company undertakes, if required by the Chicago Company, to furnish "housings and care" for the "locomotives which the said party may have from time to "time *at Denver and South Pueblo*." It will be observed that there are no restrictions as to the tracks on which *such* locomotives shall be operated. In the same section and same paragraph, the Denver Company covenants that "it will, upon like requisition, furnish in the same "manner it provides its own locomotives on the tracks
Water and Coal. "above described, all water and coal which the Chicago
Abst., p. 12. "Company will need for the operation of its trains *over* "*the railway of the Denver Company*." These covenants are in addition to those set out in section 1 and are sustained by an additional consideration, but are in aid of the enjoyment of the rights granted by that section. It is quite clear that the parties understood at the time that the Chicago Company might need housing and care for for engines operated by it into Denver and Pueblo, not only over the tracks of the Denver Company but over other tracks; and provision was made for "such housing and care" on the demised property. It was also understood by the experienced men who negotiated the contract, that the Chicago Company would need water and

coal in the operation of its trains on all railroads in its system, including that of the Denver Company, and it was provided that water and coal should be furnished by the Denver Company only on trains operated on its own railway—such water and coal to be delivered by the appliances used for the delivery of such supplies to its own trains. Why this limitation to the "railway of the Denver Company" if it was understood at the time that the Chicago Company would operate no other? This limitation implies that it was understood by the parties at the time that the Chicago Company, or its successor, might operate trains over railways other than that which was being covered by the terms of the lease. If this was not true why was the limitation to the railway of the Denver Company so carefully inserted as to the "coal and water," and omitted as to the "housing and care of the engines"?

EXCEPTIONS—USE
Water and coal.

The third article, section 1, provides, that "if the "Chicago Company shall at any time during the con- "tinuance of the term of this indenture, desire any siding, "spur or other tracks, other than those above specified, "connecting any track described in article 1, section 1, "hereof, *with its own tracks, or the tracks of any other* "*railway company*, or to any industry, or shall desire any "facilities or conveniences which do not now exist," it shall give to the Denver Company notice of its desire, and an opportunity to furnish such tracks and facilities; and if furnished it shall pay rental for the use thereof as for the other portions of the demised property. It is provided, however, that if the Denver Company shall neglect or refuse to construct such additional tracks or facilities, they may be constructed by the Chicago Company and used exclusively by it until the Denver Company shall elect to assume the ownership thereof and pay the cost of construction. The court will observe that this provision gives to the Chicago Company the right to construct and operate connections between its own tracks, *or the tracks of any other company and those of the Denver Company at any point*, including Denver;

Additional tracks
Abst., p. 5.

EXCEPTIONS—USE *Additional tracks*

and implies the right to use them in the movement of traffic from its own railway at any point to the railway of the Denver Company at any point at which the connection may be made. It was not needed to provide for a connection at Colorado Springs, as provision was elsewhere made for that. The connections contemplated were to be elsewhere; and why should the Chicago Company desire connections elsewhere if its railway was to connect with that of the Denver Company only at Colorado Springs?

Ground provision

Certain limitations are expressly stated in other parts of the contract, to which attention will be presently called. With the exception of these the rule of equality runs through the entire agreement—equality of burden and equality of right to benefits. The lessee pays a rental equal

Abst., p. 6.

to the interest at five per centum per annum upon one-

Abst., p. 10.

half of the value of the property, and for physical depreciation arising from its use in proportion to such use; rules and regulations shall be adopted by the parties and shall be "reasonable and just," securing no unfair preference

Abst., pp. 8, 11 and 12.

"in favor of one against the other;" the employes of one party whose duties shall relate to the joint use of the property shall be removed from the property so used upon the demand of the other; other companies admitted to the use of the property shall be subject to the conditions and terms imposed by this contract upon the plaintiff, and the rental received from them shall be divided between the lessor and lessee; each party may exchange business with any other company, and the prohibition against hauling passenger trains for other companies is laid upon both.

Rental.

Abst., p. 6.

For the right to thus use this property the plaintiff was to pay interest, as before stated, upon one-half of the value, which was agreed to be $3,000,000, one-half of all the taxes which should be lawfully assessed upon the property used, and to contribute to the expenses of

Joint operating expenses.

joint operation and maintenance in a proportion which should be as its own wheelage "over said property or

"any part thereof" should be to the entire wheelage over the same. The right was to the "full, equal and "joint possession and use"—and for it the Chicago Company was required to pay one-half of the value of the right to the exclusive possession and use. This "full, "equal and joint possession and use" could be enjoyed by either party, if the necessities of its business should require, to one-half of the capacity of the property and any "surplus of use" not needed by the other. The element of joint tenancy was added to the "full and equal use." In *Joy* v. *St. Louis*, Mr. Justice BREWER, then on the Circuit bench, ruled that interest on one-half of the value of property was "reasonable rental" to be paid for the right to equal and joint use by an incoming company which then had the smaller traffic, because it was admitted to all facilities for competition with the original company on its own tracks, at its own depots, and at industries which could be reached only by its tracks. The learned Justice evidently proceeded upon the theory that for the *right* to use all facilities in operation and competition as completely as they could be used for like purposes by the original company, a just and reasonable compensation is interest upon one-half the value of the property. If the interest upon one-half of the value is a reasonable compensation for the use of a railway, its facilities and appurtenances by an incoming company as they could be used by the owner, the payment of such rental alone implies the right to such use. It follows that in this case the clear and well understood words used in describing the "possession and use" granted are in accord with the presumption which arises from the amount of the rental paid. Certain it is, that the *right* will be measured by the meaning of the words used to describe it and the presumptions arising from the consideration paid, unless limitations are expressly stated or necessarily inferred from the provisions of the contract. In this case the lessee did not receive all that was adjudged in the Joy case to be the equivalent of interest on one-half the value. These parties are competitors only

EXCEPTIONS—USE
Rental.

Rec., p. 10.

Extent of Use by each party.

Joy v. St. Louis, 29 Fed. Rep., 546.

EXCEPTIONS—USE

Rental

as to traffic which the defendant can gather together and sell to the Missouri Pacific at Pueblo and to the Chicago, Burlington and Quincy at Denver; and its losses by competition with the lessee are small indeed. There are certain limitations upon such possession and use expressed in the contract; the lessee is permitted to do no business between stations which are between Denver and Colorado Springs, or between Colorado Springs and Pueblo; or to permit any express business to be done between such stations; or to charge rates lower than those of the Denver Company between points on its line except under certain conditions; or to admit other companies into the use of the property. In the proportion in which these exceptions reduce the value of the "possession and use" they increase relatively the rental agreed to be paid. This tends against the claim that limitations more important to the parties than any of these are to be established by implication. This, in connection with the rule so well settled, that the terms of a grant or demise and of exceptions therefrom are construed most strongly against the lessor, places upon the defendant the burden of establishing such implied exceptions beyond question or doubt.

The defendant contends that in this contract are provisions from which additional limitations should be implied. We invite the attention of the court to those upon which the learned counsel seem to rely as the "most convincing" or controlling:

Election to abandon line to Denver.

Abst., p. 90.

(1.) It is alleged in the answer and amended answer and was reiterated in the cross-bill, that while the negotiations which led up to the contract were pending, the Chicago Company was considering the question whether to build its railroad direct from the western boundary of the State of Kansas to Denver or to build directly to the City of Colorado Springs, and proceed thence to Denver over the railway of the Denver Company; that it was the intention of the parties, by the incorporation of section 10, article 111, in the contract, to provide that by the 1st day of April, 1888, the Chicago Company should elect "be-

"tween the two routes, and that such contract should be- EXCEPTIONS—USE
"come effectual and operative only upon the selection of *Election to abandon line to Denver.*
"such route via Colorado Springs and the exclusion of said
"route direct from the western boundary of the State of
"Kansas to the city of Denver"; that upon the giving of the notice required by said section said Chicago Company "became bound to occupy the line of defendant "company via Colorado Springs under said contract, and to "*occupy the same with all its business to and from the City "of Denver to the exclusion of any other route to or from "said city.*"

When the case was submitted to Mr. Justice MILLER and Judge HALLETT, it stood upon the issues made by the pleadings and the support given to each by the contract. As before stated, defendant's contention was overruled by Mr. Justice MILLER, and was sustained by Judge HALLETT without reservation. "If", said he, "the con- "tract which has since been made by the Rock Island "Company with the Union Pacific had then been made, "this contract would not have taken effect, because it is "expressly provided in this instrument that if the Chicago "and Colorado Railway Company shall build a road to "Denver, then the contract shall become void and ineffectual; and of course if the Chicago Company had ac- "quired the right to use the Union Pacific road at that "time there would have been no occasion for making the "contract." Judge CALDWELL also sustained the defendant, saying: "It is quite immaterial whether the de- "fendant had or had not knowledge that the charter of the "Chicago Company authorized it to construct any or all "of these different lines; conceding that it had such "knowledge, it also knew that it was competent for the "Chicago Company to elect which of the lines it would "build, and having become bound to the defendant by the "contract to build that particular line; * * * "it finally elected to build its line to Colorado Springs "and to exercise its powers under the clause of the charter "and contract for the joint use of defendant's railway,

Opinion, HALLETT, D. J. Rec., p. 87.

Opinion CALDWELL, C. J.

EXCEPTIONS—USE *Election to abandon line to Denver.*

"connecting said cities of Denver and Pueblo, instead of "building a road of its own between those points and acquiring its own terminals." In the further progress of the argument, the proposition that the Chicago Company could lawfully make the contract alleged and averred will be challenged; we are now dealing with the unwarranted assumption that such agreement was made, and will examine the testimony upon which that assumption was based.

If any such election was made, some evidence should be found in the contract and in the records of the parties, especially in the records of the Chicago Company. What is the evidence of the contract?

Abst., p. 6. Article II, section 2, provides that the Colorado Company shall pay rental "from and after the completion "of its railway from the boundary line of the State of "Kansas to a connection with the railway of the Denver "Company at Colorado Springs." In the tenth clause of the same section it is provided that

> "—no compensation will accrue or be paid to the Denver Company from or by the Chicago Company for the use and occupation of said premises before the railway of the Chicago Company shall be completed from its initial point on the western boundary of the State of Kansas to a connection with the railway of the Denver Company, *within the time hereinafter specified.*"

In the first clause of the same section, it is provided that certain betterments and improvements shall be made and covered by the agreed valuation of $3,000,000, "but "all other improvements, betterments and additions which "shall be made to the said property of the Denver Com-"pany in pursuance of the terms of this contract, *after*

Abst., p. 8. "*the Chicago Company notifies the Denver Company of* "*its acceptance thereof*, shall be added to the principal sum, "and payments shall be made thereon by the Chicago "Company as provided herein." It was also provided by

Abst., p. 9. the second paragraph of section 9, that the defendant should have the right to execute an additional mortgage of its property which should have priority over this contract. The contract added over $100,000 per annum to

EXCEPTIONS—USE
Election to abandon line to Denver.

the income of the company from *the day the rental should commence to accrue*. The fixing of that day and the definite acceptance or abandonment of the contract was a matter of great importance to the defendant. A lease of the right to the "full, equal and joint possession and "use" of its property, to commence at a time early or late in the future, as the lessee might elect, was objectionable to the lessor. Having the rental accrue only from the date of entry into such possession and use to be so fixed, might become very embarrassing to the defendant. Without knowledge as to whether or not the line the construction of which was contemplated would actually be constructed and operated, it could not enter "into "contractual relations" with other companies. Improvements and betterments added before the connection was made would be covered by the valuation fixed in the contract. The uncertainty would lose to the Denver Company the appreciation of its new bonds by an assured increase of income. The Chicago Company could also use such contract to secure more advantageous terms from other companies whose lines it could use while keeping the railway of the Denver Company, without expense to itself, covered by this contract; and Mr. Wolcott's affidavit shows that there were fears while the negotiations were going on that such course was contemplated. The Denver Company, therefore, insisted, with reason, that guaranties should be given which would protect it against such embarrassments. What guaranty would perform that office? Would the Denver Company have been relieved by a definite agreement to abandon the direct line to Denver without fixing a day by which the main line should be constructed to a connection with its own? In what way would such abandonment have protected it against the dangers apprehended? If section 10 of article III was converted into a covenant setting out in express words an election to abandon one line and to build the other, and nothing more, would it answer the purpose? What the Denver Company needed was

Abst., pp. 97, 98.

EXCEPTIONS—USE
Election to abandon line to Denver.

a promise which would fix definitely both dates, the one on which the contract should be finally accepted or rejected; the other upon which the rentals would begin to accrue. Article III, section 10, was as follows:

Abst., pp. 10 and 11.

"The Chicago Company shall, on or before the 1st day of April, in the year one thousand eight hundred and eighty-eight, notify the Denver Company whether or not it elects to build its line aforesaid from said point on the western boundary line of the State of Kansas to said Colorado Springs. If it shall elect to build such line it agrees to complete the same and to occupy the line of the Denver Company on or before the 31st day of December, in the year one thousand eight hundred and eighty-nine. If it shall elect not to build such line, the contract shall, on the 1st day of April, in the year one thousand eight hundred and eighty-eight become void and of no effect."

Abst., p. 97.

Mr. Wolcott, as a witness, says that Mr. Cable "desired that this should be inserted." Why should Mr. Cable desire any limitation of the time within which the new road should be completed? Are experienced men engaged in such enterprises anxious to so bind themselves by such limitations? In what way would the interest which he represented be benefited by such a limitation? It is plainly legible between the lines that defendant insisted that the thirty-first day of December, 1888, should be the limit of the time within which the road should be constructed. It was unwilling to delay the accruing of rental beyond that day. It is highly probable that when its demand in this regard was acceded to it was with the condition that the Chicago Company should have the right to elect within a certain time to abandon the contract—to withdraw from "contractual relations"—and leave both parties relieved of any obligations created by it. This was the change which Mr. Cable "desired"—not to secure time within which the Colorado Company could elect which it would build, the railway to Colorado Springs or the railway to Denver, but whether or not it would build *any* railway at that time. *The election was between the building by the 31st day of December, 1888, or having the contract become void and of no effect from and after the 1st day of April.* In the original draft of the contract settled in Denver February 14, 1888, the

Abst., p. 12.

day fixed for making the final choice was May 1st in that year. Mr. Wolcott so testified, and so it appears in the first draft. Mr. Cable was not anxious to abridge the time within which he should elect whether or not his company should become bound by the lease, and especially to commence the payment of rental on the 31st of December. The Denver Company would naturally desire an early decision, and a comparison of the draft of the contract settled at Denver in February with the one which was settled in New York in March, discloses a special reason why the Denver Company should desire an earlier decision. The second paragraph of article 11, section 9, of the contract as executed was not in the draft settled in February. It is as follows:

EXCEPTIONS—USE
Election to abandon line to Denver.
Abst., p. 97.

"It is understood that this agreement is subordinate to existing mortgages of the Denver Company's property and franchises, and to the bonds issued *and to be issued thereunder*. It is also agreed that the Denver Company may *hereafter issue a further mortgage which shall also have priority over this contract, upon its entire system, securing an issue of bonds not exceeding $5,000 per mile, for the sole purpose of improving, betterring and equipping* the property now owned and hereafter to be legally constructed or acquired by it with the proceeds of the bonds secured by its mortgage dated July 15th, 1886."

Abst., p. 9.

When this was incorporated the time for the election was shortened from the 1st of May to the 1st of April. The necessary ratification by the stockholders could not be had until after the 1st of May, and in fact was not had until the 29th. The question as to which line should be built, if any such question existed, was not of pressing importance. The lessor desired that the rental should commence to accrue at the earliest date to which the Chicago company would consent. The early sale of bonds, appreciated in price by the rental which the lease would secure, was a matter of moment to the Denver Company. In this we find a potent reason for the change of time from May 1st to April 1st. Another was in the provision that the cost of all betterments and improvements made "after the Chicago Company notifies the Denver Company of its acceptance" of the contract were to be added to the valuation of $3,000,000. The Denver Company desired

Abst., p. 12.

EXCEPTIONS—USE *Election to abandon line to Denver.*

to capitalize all expenses which should be incurred after the 1st of April. It was also desirable that a day be fixed beyond which the making of such betterments and improvements could be postponed, with a view to the capitalization of cost.

Abst., pp. 38, 39.

The record of the Chicago Company is in evidence—a record which was in the office of Wolcott & Vaile, from the time it was made until placed in the hands of the examiner who took the testimony. It shows that the directors of the Chicago Company at their meeting held in New York on the 7th day of March, 1888, approved the revised contract which was signed on the day following, and authorized the President to notify the Denver Company, "that this company will construct its railway from the western boundary of the State of Kansas to a connection with its railway at or near Colorado Springs before the 31st day of December, 1888; and that when its railway is completed to such connection it will enter upon the joint use of the railway of" the Denver Company. This action was had at the meeting which not only approved the revised contract, but which also approved the plan submitted by the president for securing moneys for the construction of the entire railway. Said the president:

Abst., pp. 33, 96.

Abst., p. 96.

"The railway to be constructed by this company will commence at a point on the boundary of the State of Kansas, at which it will connect with the Chicago, Kansas and Nebraska railway. The company by which that road will be constructed has power under the laws of the States of Kansas and Colorado to extend its railway into the last named state on the line on which this company proposes to construct its railway. It has completed its arrangements for securing the money which will be needed in such construction, and is a party to leases and traffic arrangements which make it a part of the Chicago, Rock Island and Pacific railway system. Its officers advise me that if this company will merge its powers and franchises with those of the Kansas company, by consolidation, it will construct the road from the initial point to Colorado Springs, without delay. I recommend the favorable consideration of this proposition."

Neither in the contract nor in the proceedings of the directors do we find any mention of the direct line to Denver.

The notice was given on the 17th day of March and was in strict conformity with the contract and the authority given to the president in the resolution adopted on March 7th. It was asserted by the learned counsel for the defendant in the court below, as we assume it will be here, that

EXCEPTIONS—USE *Election to abandon line to Denver.* Abst., p. 96.

> "—the Chicago Company by its articles of incorporation was authorized to build on *any one* of three ways into Colorado from a given point on the eastern boundary of the state; one route was to Denver; one route to Colorado Springs; and one route to Pueblo. The question of selection of route was a subject for consideration, and directly involved the situation of the parties at the time of the negotiation."

Defendant's Argument, Cir. Ct., p. 21.

The learned gentlemen who revised these articles of incorporation and under whose direction the company was organized should be able to state more accurately the objects and powers of the company. Instead of authorizing the construction "upon any *one* of three lines" the articles declared a purpose to consruct or acquire a main line from the eastern boundary of the state on the "most feasible route to the city of Colorado Springs"; with "a branch therefrom running in a north-westerly "direction by the most feasible route to the city of Den- "ver"; "with a further branch therefrom extending in a "south-westerly direction to the city of Pueblo"; "with "a branch therefrom extending from the city of Colo- "rado Springs northerly to the city of Denver," and "with a branch therefrom extending southerly from the "city of Colorado Springs to said city of Pueblo." Here is express authority to construct a main line with four branches, instead of a railroad "on any *one* of three "lines." In the articles prepared by Mr. Withrow, it was provided that the company might build from the initial point "to said city of Denver, Colorado Springs or "Pueblo *or to all* of said cities; or it may construct to one "or more of said cities, and acquire the right to operate "exclusively or jointly with the owner, its trains over "any railway which now exists or may hereafter exist "connecting with said cities." Mr. Vaile testifies that there is no material difference between the objects and

Abst., p. 4.

Abst., pp. 28 and 29.

Abst., p. 31.

EXCEPTIONS—USE
Election to abandon line to Denver.

powers described in the two papers. No election between lines was involved. The company was not restricted to one of three, but could build on all. It is said that the contract recites that the road "was being built" "and it was not a question as to whether they should build "at all, but as to the route they should choose." The route of the main line was fixed by the articles of incorporation. It was to extend from the initial point on the eastern boundary of the state, "in a south-westerly di-"rection by the most feasible route to the city of Colo-"rado Springs." The termini were fixed by the articles and the ascertaining of the "most feasible route" between those termini was a matter of engineering. It could not in any case involve abandoning one or more of the branches.

But the defendant relies upon certain, or more accurately, uncertain, conversations between Mr. Cable and its officers preceding the execution of this contract. Mr. Edward O. Wolcott, general counsel for the defendant company, "always *understood*" and was "led to *believe*" that if the contract was executed the direct line to Denver would be abandoned. By the representations of Mr. Cable, that the new company would do a "very large "and extensive business in Colorado," on a wheelage which would give to the Denver Company a large revenue, Mr. David H. Moffatt, president, was "led to "*understand* and *believe*" that the time to April 1, mentioned in the 10th section of article III, was "given in "order that the said Cable, and the people building said "line might determine whether or not they would build "the proposed line to Colorado Springs, the *understand-*"*ing* of affiant being that said Chicago, Rock Island and "Colorado Railroad Company had not then determined "whether it would build direct to Denver and Pueblo or "build direct to Colorado Springs; and it was the *under-*"*standing* of affiant that if the said Chicago, Rock Is-"land and Colorado Railroad Company should determine "to build direct to Denver and Pueblo, that then, *as a*

Abst., pp. 97, 98.

Abst., p. 99.

EXCEPTIONS—USE

Election to abandon line to Denver.

Abst., p. 100.

"*matter of course*, the proposed contract would not be "entered into." Mr. Sylvester T. Smith, general manager of the Denver Company, remembers that Mr. Cable "merely mentioned an independent line into Denver "without giving any idea of any particular line," and that he declared that "there was not any question *in his mind* "but what *this* would go by way of Colorado Springs;" "that they had no idea of building any other road, but "they were coming by way of Colorado Springs—that "was the substance of it and about all of it"; that he said nothing "directly" as to whether they would want this contract if they did build an independent line, "but "the *inference* was that if they built an independent line "they would not use the Rio Grande line." And this is all. No action by any board of directors or meeting of stockholders—no express declaration even by Mr. Cable or any other executive officer, that the purpose declared and the powers assumed in the articles of incorporation would be abandoned. No written word by any stockholder, director or officer. All is mist and haze—"impressions," "understandings" and "inferences" drawn from conversations so indistinctly remembered that not one word can be repeated. The direct line to Denver is not mentioned in any speech, record or contract. Yet it has been seriously argued by learned counsel and deliberately adjudged by the Circuit court that franchises granted by the sovereign power, and duties to the public assumed in a solemn contract between the state and this corporation have been annulled and abrogated, without consulting the sovereign and without even express mention in any transaction from which such abrogation is inferred. Are corporations allowed to relieve themselves of their obligations to the public by private contracts which are void as against public policy? Will a court of equity be swift to find such a purpose in any transaction which can be harmonized with a pursuit of the corporate object and a due regard of the rights of the public? These questions will be further considered at a later stage in this argument.

EXCEPTIONS—USE

Special line from Pueblo.

(2.) The defendant contends further that the "full, "equal and joint possession and use" is limited to traffic moved by way of Colorado Springs, by an implication flowing from the following clause in article III, section 4 of the contract:

Abst., p. 8.

"— but it [referring to the Chicago Company] shall have the right to transport persons and property between stations *on its railway and connecting lines and all points between and including Denver and South Pueblo: Provided, however, that if the Chicago Company shall at any time acquire by purchase, construction or otherwise, a railway extending not less than fifty miles from Pueblo, it shall have the right to transport persons and property between any point on said line and Denver.*"

The contract contemplates through lines between all points on the line of the Denver Company's railroad between and including Denver and South Pueblo and all points on the line of the Chicago Company and on the system of railways of which it will form a part. The general provisions of section 4, article III, arranges such through lines between all points on the Denver Company's railway between and including Denver and Pueblo and all points on the railway of the Chicago Company "*and* "*connecting lines.*" The mere presence of this proviso in the contract shows very conclusively that, in the judgment of the parties the line which would extend "not less than "fifty miles from Pueblo" would not be a part of any system of railway then being built, of which the Chicago Company would form a part, and that it would not be a line "connecting with" that railway. If it would be either there was no need for such proviso, as in either case persons or property could be transported between any point on that railroad and any point on the railroad of the Denver Company between and *including Denver* and Pueblo. Pueblo would be a point on the line of the railway "extending from" it, and Denver was a point on the railway of the Denver Company. Traffic could be carried not only to Denver, but to every point between Denver and Pueblo. As a railroad outside of a system of which the railway of the Chicago Company would form a part, and not connecting with that railway, it would not

EXCEPTIONS—USE *Special line from Pueblo.*

be entitled to the benefits secured to the Chicago Company by the contract; hence it was necessary to make some special arrangement for it, and that arrangment was, that traffic might be carried from any point on that line *to Denver*—excluding all other points. To this arrangement the learned counsel and the Circuit court apply the maxim: *Expressio unius est exclusio alterius*, which is quite proper. The including of a railway extending from Pueblo, which formed no part of any system with the Chicago Company's railway and which was not connected with it, excluded all other railways extending from Denver or any other point *which formed no part of said system and had no such connection.* But does it exclude a railway which runs from Limon to Denver, and which *is a part of such system and has such a connection?* That is a very different matter. If the Rock Island Company should extend its railway from Denver any distance, the through line established by this contract would not extend over it if it did not form a part of such a system or did not have a connection with the railroad of the Chicago Company. The line between Denver and Limon is not only a part of the system, but has a direct connection with the railway of the Chicago Company at Limon—more, the only traffic it carries is received from or delivered to the railway of the Chicago Company at the point of connection.

This special provision was incorporated in the contract because there was in the vicinity of Pueblo large deposits of coal and other mineral, for which Denver was a desirable market. When the contract was made, the Chicago Company did not embrace within the objects declared in its articles of incorporation the construction, acquisition or operation of any railway extending beyond Pueblo. It might amend them in such manner as to enlarge its declared objects, but a question might arise as to the effect of such amendment with regard to the contract and the additional line. It could construct a railway extending from Pueblo to a connection at Colorado

EXCEPTIONS—USE *Special line from Pueblo.*

Springs, possibly within the fifty miles, but only by tracks which would lie near to and be parallel with those of the Denver Company, for the rental of which it would be liable even if it did not use the property. If for the purpose of securing access to these mineral deposits it should construct or require a railway extending from Pueblo, but not connecting with the railway of the Chicago Company at or east of Colorado Springs, it would have no right to connect with the Denver railroad at Pueblo or carry the mineral thereon, under the contract, to the Denver market. For this reason the special provision covered by the proviso was incorporated into the contract. "But," it is answered, "like mineral deposits exist within a like radius about the "city of Denver and other points on the Denver line;" all of which is conceded to be true. Its legal effect upon this provision of this contract is not readily discernible. Even if a business mistake has been made, it will not affect the rights acquired or extend the scope of *expressio unius*. The courts will not take from us that which we have because we omitted to secure more.

"Running with the railways." Abst., p. 11.

(3.) It is provided in article III, section 9 of the contract, that it

> "— shall attach to and run with the railways of the respective parties during the corporate existence of each, and of all extensions of such existence by renewal or otherwise; and shall be binding upon the lessees, assigns and successors of each during the continuance of their several corporate existences."

2 Wash. Real Prop. (3d ed.) p. 264; 1 Warville's Vend., p. 421, Sec. 9.

In this, the learned counsel for the defendant finds the most "convincing" evidence or an intention to restrict the "full, equal and joint possession and use" to the carrying of traffic by way of Colorado Springs. A covenant runs with the land when "it becomes in effect "a part of the estate itself, and whoever takes the estate, "in one case should have the benefit, and in the other "should bear the burden; and this, it is believed, covers the "decided cases, and applies as well to covenants of title "between grantor and grantee as between lessor and "lessee." This is all there is of it. The parties declare

a purpose to make this contract a part of their railroads and to bind the owners now and hereafter to the performance of the same. Such covenant throws no light upon the meaning of any provision of the contract. Its purpose is to make each provision, without regard to its meaning, a part of the property. It defines no duty, obligation or right of either of the original parties, and does not enlarge or restrict them when transferred to an assignee or successor.

EXCEPTIONS—USE "*Running with the railway.*"

It was said by the learned counsel in the court below:

> "We think this clause alone is absolutely controlling as to the question now being discussed, and that whatever the rights of the complainant may be to operate the lines formerly belonging to the Chicago Company it cannot avail itself of this contract as to any other line than that of the Chicago Company described in the contract, to which line alone the contract attaches."

Defendant's Argument, Cir. Ct., p. 13.

This contract was attached to the Chicago Company's railway and to the Denver railway when it passed into the ownership of the Kansas Company and into the leasehold possession of the St. Joseph and Rock Island Companies. That is provided for by this covenant. This section relates to the title of the successor, but defines no duty and limits no right. That which the Chicago Company could do the Rock Island as its successor may do. If the Chicago Company could transport persons and property to and from any station on its own line or any connecting railroad to or from any station on the line of the Denver Company between and including Denver and Pueblo, the Rock Island Company may do the same. If the Chicago Company could construct "any siding, spur "or other tracks * * * connecting any tracks de- "scribed in article 1, section 1, with its own tracks or the "tracks of any other railroad company, or to any indus- "try," the Rock Island Company may do the same. If the Chicago Company was granted the "full, equal and "joint possession and use" of any of the defendant's property, the right to the like possession and use was passed to the Rock Island as its successor.

(4.) These are the principal provisions upon which the

EXCEPTIONS—USE *Water and Coal.*

defendant relies in support of the proposition that the "full, equal and joint possession and use" of this property is limited to the transportation of persons and property by way of Colorado Springs. Others were presented to the court below, and among them are the covenants of article I, section III, concerning the supply of coal and water, to which we have called attention as supporting complainant's construction of section I of the same article. The defendant's argument founded on these covenants was approved by the Circuit court. The learned judge called attention to the limitation of coal and water supply to trains "operated on the railway of "the Denver Company," but why such limitation should be necessary if the railway of the Denver Company was the only one to be operated by the Chicago Company was not explained.

Abst., p. 10.

"By way of Colorado Springs." Abst., p. 5.

As to the others, it is only necessary to say now: It is true, as recited in the preamble, that the railway of the Denver Company runs through Colorado Springs, as it does through Castle Rock, Palmer Lake and Cactus; but it does not follow that the "full, equal and joint pos- "session and use" under this contract is restricted to the carrying of traffic by way of Castle Rock, Palmer Lake or Cactus. It is true, that as recited in the preamble, the parties contemplated the establishment of "through "lines," but it was not the intention that such through line to Denver should never be shorter than by way of Colorado Springs. It is true, that the Chicago Company did own a railway which was *then* being constructed from the eastern boundary of the state to Colorado Springs, also that it constituted its main line as described in its articles of incorporation, also that among its objects then declared in said articles was the construction, or acquisition by purchase, lease or otherwise, of branches extending from some points on said main line to Denver; and that said point of connection was made at Colorado Springs, not for the convenience or interest of the Denver Company, but for the reason that it gave the Chicago

"Through lines."

Description of railway.

EXCEPTIONS—USE

Company a very direct line to Pueblo, and a circuitous one to Denver, which could be improved by the construction or acquisition of the proposed branch. It is true, that the rental was to accrue from the making of the connection at Colorado Springs, and the occupation of the Denver railway by the Chicago Company— an arrangement which would have been proper if it had been expressly declared on the face of the contract that the Chicago Company would thereafter acquire, as its successor has, a branch direct to Denver, and use the same terminals in the operation thereof. The proposed acquisition and operation of other railways in connection with the Denver railway furnished no good reason for delaying the accruing of rental after the Chicago Company entered into the possession and use. It is true, that the Chicago Company did covenant that it had power and authority, as it had, to build from the eastern boundary of the state to Colorado Springs; but it is not implied from this that it had no other power. Whether the branches were acquired or not, whether they were operated or not, whether all traffic was or was not carried by way of Colorado Springs, the important matter to the Denver Company was, the power to make a connection which would make the contract operative. The first point of connection, which it was probable would be for many years the only point, was to be at Colorado Springs; hence the covenant that it had power to build to that place. If it had power to make other connections, and a covenant as to the one first contemplated was quite as sufficient as the power to make a dozen.

Date when rental should commence to run.

Abst., p. 6.

Covenant as to power.

Abst., p. 10.

If the covenant to connect at Colorado Springs is sufficient to limit by implication the use granted by unambiguous words, what should be said of the express power given to the Chicago Company to construct tracks connecting *its railway* with that of the Denver Company at any place between and at Denver and Pueblo?

Connecting tracks

Why provide for connection at any point between and including said cities, if it was understood that the Chicago

EXCEPTIONS—USE

Limitations not implied.

Company would carry to all points on defendant's line only by way of Colorado Springs?

Hudson Canal Co. v. Pennsylvania Coal Co., 8 Wall., 277.

A grant or demise expressed by language carefully chosen and having a well understood meaning, is not restricted or limited by strained inferences wrenched from other parts of the contract. Even a clear recital in the preamble, the object of which is to explain the contract, will not operate to limit or modify the unambiguous language in the body of the contract itself. It can so operate only when the language in the contract is not clear. It has been so settled by uniform authority. A notable case is *Walker* v. *Tucker*, in the Supreme court of the State of Illinois. The lessees of a farm sub-let it, reciting in the sub-lease that they "are desirous to lease "and convey to said parties of the second part the right "of mining for and excavating coal on the said premises "during the continuance of said lease and the amendment "thereto." There was no suggestion in the preamble of any intention to sub-let the farming lands under which the coal was lying, for farming purposes. By the sub-lease, however, the lessees assigned to the sub-lessee "the "farming lands described and mentioned in the said "articles of agreement, with a lease from said Ledyard, "together with the right to mine, dig, extract and carry "coal from the said premises described in Ledyard's lease "and amendment thereto, or any part thereof, together "with the use, enjoyment and occupation of so much of the "surface of said lands, as may be necessary to carry on "or conduct the mining for coal on said premises or any "part thereof," etc. The sub-lessee claimed the possession and use of the farming lands, and the claim was resisted upon the ground that the preamble showed that it was the intention of the parties to sub-let mining rights only. The Supreme court sustained the claim of the sub-lessee. Said SCOFIELD, J., in delivering the opinion of the court:

Effect of preamble.

Walker v. Tucker, 75 Ill., 525.

"It is true in construing an instrument of this character, it must be considered with reference to its objects and the whole of its terms; still, when by the use of general words, the inten-

tion is clearly and unequivocally expressed, the court is bound by it, however capricious it may be, unless it be plainly controlled by other parts of the instrument."

EXCEPTIONS—USE

There is no repugnancy between the preamble and article 1, section 1, as construed by Mr. Justice MILLER; and if there was, the clear language of the section would control.

(5.) It is also claimed that there is an express recognition of the alleged fact that traffic should move by way of Colorado Springs, in article III, section 4:

Traffic arrangement. Abst., p. 11.

"If the Chicago Company hauls through traffic destined to points beyond Denver or South Pueblo to said points, instead of delivering it to the Denver Company at Colorado Springs, it will receive no larger division of the through rate because of such additional haul."

The contract of which article 1, section 1 is a part, relates to the joint operation of the Denver Company's railway *between and at Denver and Pueblo*. The clause above quoted relates to the traffic destined to and from points "*beyond* Denver and South Pueblo," and is a traffic arrangement entirely outside of the general scope of the contract. The Rock Island Company could not haul such traffic to destination, and without an arrangement it would carry it to either Denver or Pueblo and there deliver it to the Denver Company; and then insist upon a division of the through rate upon the basis of mileage. This arrangement made Denver, Colorado Springs and Pueblo common points, at which the Rock Island could deliver through traffic destined to points beyond Denver and Pueblo, and receive the same proportion of the rate which it would receive if it availed itself of the longer haul. As before remarked, it was a traffic arrangement purely, and was no part of the lease proper.

(6.) The defendants further insist that article 1, section 1, should be construed to limit the "full, equal and "joint possession and use" in such manner as to require the plaintiff to carry all traffic by way of Colorado Springs, because:

(*a.*) Of the great wrong which it would sustain if a

EXCEPTIONS—USE reduction is made of the wheelage of the Rock Island between Denver and Colorado Springs.

(*b.*) Of the great abuses to which the Denver Company might be subjected if the section should be otherwise construed; and

(*c.*) Of the inconvenience which would result from a construction of the section in accordance with the usual meaning of the words which compose it.

In the discussion of these several propositions we will endeavor to show how the parties are and will be affected by the contract as construed by Mr. Justice MILLER.

Distribution of burden.
Abst., pp. 60, 61, 118, 119.

The value of the property as fixed by the contract, including certain betterments and improvements to be made, was $3,000,000.00. On the 31st day of August, 1889, $747,452.97 had been added and capitalized for betterments and improvements made after the first of April, 1888—one year and five months. The Rock Island Company was paying interest upon one-half of the aggregate of these sums, at the rate of five per centum per annum. This interest was accruing at the rate of $93,686.32. How much it has been increased since by the additional betterments and improvements, does not appear. It was paying in addition to this sum, one-half of the taxes assessed upon the property demised, amounting to about $15,000 per annum—making the interest and taxes amount to $108,686.32. The Denver Company was paying the same sum for the use of the same property. The testimony shows that at the same time, of the entire use of the railway between Denver and Pueblo, the Rock Island Company was having 7½ per centum and the Denver Company 92½. Each was carrying 50 per cent. of the burden. A payment by the defendant in the proportion of its use as compared with that made by the Rock Island would have amounted to $1,304,215.84—$10,864.46 per mile—nearly one-half of the value of the railway. On the basis of use, for $1.00 paid by the Denver Company, the Rock

Island paid $12.33. In the original valuation, Mr. Smith placed the terminals at Denver at $700,000; at Pueblo at $200,000. Mr. Parker's valuation covered about 117 miles of railway between Denver and Pueblo, and amounted to $1,862,110, which would leave of the $3,000,000 value of the entire property subsequently agreed upon, $1,137,890 as the value of the railway and terminal property in the cities named. Mr. Smith's valuation covered 120 miles, which embraced all of the main tracks and right of way in both Denver and Pueblo. His valuation of terminal property in both places was $900,000—$237,890 less than the difference between Parker's valuation of the 117 miles and the aggregate valuation agreed on. Mr. Smith placed $700,000 of this in Denver. The testimony shows that on August 31, 1889, $108,159.14 had been added for betterments and improvements in Denver, making the capitalized value of the Denver terminals upon the basis of Mr. Smith's valuation and the sums paid for additional betterments and improvements, $708,159.14. The Rock Island Company had but ten per cent. of the traffic accommodated there; and for the right to have it admitted it paid on the date named, interest on one half the value of the yards, and the Denver Company paid the same. If it had paid in proportion to its use as compared to that of the Rock Island, the sum would have been $159,337.78—nine dollars for every one dollar paid by the Rock Island. Mr. Smith placed the value of the yard in Pueblo at $200,000. The testimony shows that on August 31, 1889, $109,815.04 had been added in a year and five months for betterments and improvements; making the capitalized value of the property $309,185.04. Pueblo is the point of junction of the branches of the Denver railway. The company has 1,500 miles in its system—over 1,300 of which are south and west from Pueblo. Much of its traffic from the south and west is there exchanged with the Missouri Pacific, and possibly other carriers, to the East. Of the entire traffic handled in the yard at

EXCEPTIONS—USE

Distribution of Burden.

Pueblo, 62 per cent. never passes over any portion of the tracks between that place and Denver. The tracks north of Pueblo furnish 38 per cent. of the use for that yard, and 12.5 per cent. of that is furnished by the Rock Island —87.5 per cent. by the Denver. Of the entire use of the yard, the Rock Island has 4.75 per cent., and the Denver 95.25 per cent. Each company bears 50 per cent. of the burden of carrying the property. The proportion of use is 4.75 to 95.25. The testimony shows that the traffic of the Rock Island in the yard at Denver is equal to 10 per cent. of the whole, and it is claimed, of this 9 per centum is carried by way of the Union Pacific. Waiving the probable exaggeration of the proportion which moves by way of the Union Pacific, 9 per cent. of the traffic in the yard does not enter over the line between Denver and Pueblo, while 62 per cent. of the traffic in the Pueblo yard comes and goes by other tracks. The plaintiff's grievance is, that 9 per cent. of the traffic in the Denver yard contributes nothing to increase plaintiff's porportion of the wheelage—a condition which ought to be somewhat ameliorated by the fact that 62 per cent. of that which is cared for at Pueblo makes no contribution to increase the proportion of the defendant's wheelage. The exclusion of 9 per cent. at Denver and the admission of 62 per cent. at Pueblo, expresses the defendant's conception of "full, equal and joint possession and use" of this property. The beauty of this conception is increased by the fact that the 9 per cent. to be excluded at Denver is the traffic of the party which contributes 50 per cent. to the burden and receives 7.5 per cent. of the use between Denver and Pueblo, while the 62 per cent. admitted at Pueblo is the traffic of the party which contributes 50 per cent. to the burden and has 92.5 per cent. of the use.

Abst., p. 107.

Abst., pp. 107, 108.

Proportion of use of terminals.

But it is earnestly urged that the traffic to and from the Denver yard contributes nothing to the expenses of joint operation and maintenance of that yard. The entire Rock Island traffic therein is ten per centum of the whole

—the Rock Island Company contributes on the basis of the average mileage, between Denver and Pueblo, 7.5 per cent. to the joint yard expenses. The 2.5 per cent. remaining unprovided for is borne by the Denver Company which enjoys the use of 42.5 per centum of the capacity of the same yard, on the cost of which the Rock Island Company pays five per centum per annum. Of the traffic in the Pueblo yard 62 per cent. does not pass over any portion of the railway jointly used by the parties hereto. The Rock Island Company carries into and takes from that yard 4.75 per cent. of the entire traffic and contributes to the joint operation and maintenance 12.5 per cent—7.75 per cent. more than it would be required to pay if all of the traffic was excluded except that which passes over the joint track.

EXCEPTIONS—USE *Proportion of use of terminals.*

This unselfish defendant not only takes the 7.75 per cent. imposed upon the complainant by traffic between Pueblo and points south and west therefrom, but appropriates to its own use 45.25 per cent. of the capacity of the yard upon which the Rock Island Company is paying interest at the rate of five per cent. per annum. Not content with the 42.5 per cent. of the use of the capacity at Denver, 45.25 at Pueblo and 7.75 per cent. of the operating expenses in addition to the proportion which the Rock Island Company would pay if the traffic at Pueblo was restricted to that which passes over the joint tracks, the defendant stands at the bar of a court of equity insisting that it shall not be burdened with the 2.5 per cent. of expenses of maintaining the yard at Denver for complainant's traffic which does not pass over said joint tracks.

Relief from this burden, however, is not all or even the major portion of the subject-matter of the defendant's desire. It wishes to add to the sum of the rental of over $108,000 per annum which the complainant pays for the right to use this property and the $30,000, its proportion of the expense of joint operation and maintenance, a sum amounting to over $40,000. The 2.5 per

Additional rental.

EXCEPTIONS—USE
Additional rental.

centum of expenses of joint operation and maintenance in the Denver yard is comparatively a nominal matter. That per centum for the entire property amounts to about $9,000 per year. This includes the expense of joint operation and maintenance of the entire property demised, including main tracks and all the yards between and at Denver and Pueblo. The proportion of this applicable to the Denver yard is but a small fraction. The answer and cross-bill filed in the cause shows that the defendant claimed, in addition to the rental and expense paid under the contract, over $40,000 for the joint service and use of the terminals at Denver for traffic by way of the Union Pacific during the first year of such use. An attempt was made by the testimony of Mr. Pike to show that if the Union Pacific traffic was carried by way of Colorado Springs it would add from $30,000 to $40,000 per year to the income of the Denver Company. This harmonizes with the claim made in the answer and cross-bill. The sums already paid as rental and as proportion of the expense, amount to nearly $140,000, for 7.5 per centum of the use of the property, minus 7.25 per cent. excess of payment over use in the Pueblo yard, plus 2.5 per cent. additional use of the Denver terminals. To this defendant proposes to add not 2.5 per cent. of the expense of joint operation and maintenance of the Denver property, but over 28 per centum of the rental and joint expense for the maintenance of the entire line.

Abst., p. 117.

This is supported by the conduct of defendant with regard to the voluntary efforts which complainant has made to provide a manner in which the differences between the use of the terminals and the use of the main line could be measured. The proposition to agree upon a method was rejected. Plaintiff's efforts to secure a settlement of such a plan by arbitration were treated, first, with contempt; then accepted; then abandoned; then resumed, and again abandoned. When complainant, by the amendment to its bill again offered to make such arrangement it was again refused. The defendant could have secured contribution

Abst., pp. 17-21.

to the operation and maintenance expenses of the terminals upon the basis of the actual proportion of use of the terminals if it had so desired. It was not content with this. A rental which represents one-half of the value of the property, paid by a party who had 7.5 per cent. of the use. less 7 75 per cent. use of the Pueblo terminals, plus 2.5 per cent, of the additional use of the Denver terminals, is not in the judgment of the Denver Company, adequate. The decree of the Circuit Court presents to the plaintiff the option to comply with this demand of the defendant or secure other yards for a portion of its traffic and have two yards at Denver, or to abandon the Union Pacific line and carry all traffic to and from Denver over an additional sixty-four miles of railway with a maximum grade of seventy-five feet in the mile.

After all, has not the importance of the wheelage been greatly magnified? It is the basis upon which the expenses of joint operation and maintenance are apportioned between the parties. The judge of the Circuit court, who delivered the last opinion and whose name is affixed to the final decree, seems to have regarded it as the principal factor affecting the revenues to be derived by the defendant from the operation of the lease. It is really a matter of little consequence. The operation of trains over tracks subjects them to a physical deterioration, which renders necessary expenses for repairs or maintenance. The expenses are large or small, as the use is large or small. The rule of apportioning such expenses between parties who jointly operate a railway, in the proportion of wheelage, is founded on the fact and theory that each should contribute in the proportion in which its use deteriorates the property. When the Rock Island Company reduces the use it reduces the proportion of deterioration; reducing its proportion of the expenses of maintenance, is attended by a corresponding reduction in the wear of the property by its use. While it is true that the wood in the ties and structures decays from natural causes, that con-

EXCEPTIONS—USE
Additional Rental.

stitutes but a very small percentage of the physical depreciation of a railway. But it is said that the salaries of joint employes are paid by the parties in the proportion of wheelage. The aggregate of these salaries is increased or diminished as the amount of service required is increased or diminished; a service adequate to the requirements of a large traffic requires a larger number of joint employes than a service sufficient for a smaller traffic. When either party reduces its use, it reduces the proportion of its contribution, and in the same ratio the proportion of the service which it requires. In other words, the expenses of joint service and maintenance have in them no element of profit which affects the net revenues of the defendant company. The proportion which the complainant contributes is intended to replace or make good only the depreciation which the property sustains because of its use.

Effect upon income of defendant.

But it is said that the expenses of operating and maintaining the Denver yard are increased by the increased use of the yard for the traffic by way of the Union Pacific, while the proportion of the wheelage on the line between Denver and Pueblo is reduced. The testimony of the secretary of the general manager shows that if all of the traffic which the Rock Island handles over the direct line between Denver and Limon was carried by way of Colorado Springs in addition to that which is now carried that way, the effect would be to increase the proportion which the complainant contributes to the joint expenses about $31,000 per year—about double the amount which it now pays; but the secretary does not show how much this increase of the use would increase the cost of joint operation and maintenance; and without such statement it is impossible to ascertain what net revenues the Denver company loses by the transportation over the direct line. In this connection it may be well to remember that the rental for the use of the same portion of the railway—apportioned on the basis of mileage was $67,916.25 per year, and that the diminution of wheelage wrought no

Abst., p. 109 *et seq.*

reduction in this. Relatively the rental increases as the wheelage is reduced. EXCEPTIONS—USE

A considerable portion of the argument of the learned counsel for the defendant rests on dire disasters which may occur. The Rock Island Company may acquire the Union Pacific system at one end and the Santa Fe system at the other, and flood the yards at Denver and Pueblo with the traffic of these carriers. *Abuses.*

This vaticination appeared early in this case. Said Judge HALLETT, in dissenting from the opinion of Mr. Justice MILLER:

"Morever, if the complainant in this suit should now acquire a line going into Pueblo in the same manner that it has acquired a right to enter Denver, by a distinct line, there would then be no use whatever for the Rio Grande road between Denver and Pueblo, and the use of it in the way in which it is mentioned in this contract for estimating the cost of maintenance by wheelage and all that would become ineffectual." Opinion of HALLETT, D. J. Rec., p. 87.

No abuse more gross than this has been conceived by either court or counsel. Concede that it is within the scope of the possible; a moments reflection will satisfy any man experienced in such matters that it is the superlative of the improbable. The maid may become a wife, and then a mother and then her child may be drowned, but no discreet person will advise the maid to convert herself into a "Niobe, all tears," because of such possibilities; and all such persons will unite in advising the Denver company to refrain from any concern lest the Rock Island company will become the unfortunate owner of the Union Pacific and Santa Fé.

But if this should occur, what?

We will, for the purpose of this argument, measure, in dollars and cents, the hardship which would be imposed upon defendant, if the complainant should "flood the yards at Denver and Pueblo," and refrain from turning a wheel on defendant's railway between those points. When the valuation was made, as already stated Mr. Smith estimated the total value of the terminal property at the points named at $900,000. Better- Abst., p. 60.

EXCEPTIONS—USE *Abuses.* Abst., p. 118.

ments and improvements made between April 1, 1888, and August 31, 1889, increased this value to $1,017,344.-18. One-half of this represents the value of one-half of the capacity of this property demised to the Chicago company. It could use but one-half of such capacity if the defendant needed the use of the other. For this right it would pay on the valuation of August 31, 1889, over $108,000 per year, which is over 20 per cent. per annum of the value of the property used. Such oppression is usually regarded by lessors as endurable.

For the privilege of paying such rental the management of the Rock Island would retain the right and throw away the use of the railway between Denver and Pueblo; which use would subject it only to the payment of its proportion of the expenses of joint operation and maintenance. Railway managers sometimes do foolish things, but there is no record of any action so foolish as this would be.

But the defendant is not the only party who may suffer because of conditions other than those which existed at the time this contract was executed. Is not the acquisition of the Colorado Central, or even of the entire Union Pacific system, by the Denver Company quite as probable as a like acquisition by the Rock Island? Is not the control of the Santa Fe and Missouri Pacific systems by the Denver Company as completely within the range of the possible as the acquisition of one of them by the Rock Island is within the range of the probable? Assume that these facts are accomplished, may the Rock Island object to the introduction of the Colorado Central traffic into the Denver yard, or of the Santa Fe and Missouri Pacific traffic into the Pueblo yard? It appears by the testimony in this case that the defendant has contemplated the completing of a short line from a point near Acequia creek about fifteen miles south of Denver, to a point on its own line near Leadville. The proposed line would shorten the distance between Denver and Leadville about seventy-five miles; and it is fair to assume that

Abst., p. 199.

more than fifty per cent. of the traffic now moved over the property covered by this contract from Denver to Pueblo would be diverted to the new line. Such a result would greatly increase plaintiff's proportionate share of the expense of maintenance under this contract, though its use of the property would remain the same. Would the complainant in such a case be permitted to exclude from the Denver yard the traffic which would be brought into it over such new line? A contract for the use of railways through a term of 999 years is made in view of the changing conditions which result from the development of railway systems in a country like this, and no change of condition can operate to restrict or limit the meaning of the unmistakable language used in this contract—"the full, equal and joint possession and use."

EXCEPTIONS—USE *Abuses.*

But what connection does the matter of wheelage have with the *right* to the "possession and use" of this "railway and every part thereof"? Is the "full, equal and "joint possession and use," qualified or limited by the proportions in which the expenses of operation and maintenance are divided? By the terms of one article in the contract the Denver Company granted the right—in another the parties agreed upon the rental which should be paid, and upon the manner in which the expenses of operation and maintenance should be divided; and now, we are assured that because the use to the full limit expressed by the words employed in describing the *right* may reduce the proportion in which we will contribute to the expenses of the operation and maintenance, the right must be restricted and modified. We do not usually find the limitations of the grant in the provisions of the contract for the division of the expenses of operation and repairs. The consideration paid for the right may be regarded as an indication of the intention of the parties, and the consideration in this case is in accordance with the meaning of the words used in describing the use. If the diminution of the proportion of expenses of maintainance implies a limitation upon the right to use, what im-

How does the proportion of wheelage affect the right to use?

EXCEPTIONS—USE

plication arises from the fact that the rental which is the cost of carrying one-half of the property, and is never diminished?

"Reciprocal benefits."

It may not be improper to note in this connection the "reciprocal benefits" discovered by the learned judge of the Circuit court who delivered the last opinion in the record. "If the plaintiff," quoting from the opinion, "had "its independent line, it would have to pay the entire cost "of maintaining and operating the same, whereas under "the contract it is relieved of a large share of its burden. "It enjoys the use of defendant's line and the expenses of "maintaining, repairing and operating it are apportioned "between the two companies in proportion to the wheel-"age of each."

We have already endeavored to show that the expenses of operation and maintenance cover only actual services received and actual wear of the property. It is obvious that a given amount of traffic involves certain expenses for operation and repairs, whether carried over a railway used by one company or many. The economy of joint operation is not in reducing the expenses of operation and maintenance, but in dividing the burden of the cost or value of the property. A division upon a fair basis confers benefits upon both parties, and promotes the interests of the public. Said Mr. Justice BREWER, in *The Chicago, Rock Island and Pacific Railway Company* v. *The Union Pacific Railway Company.*:

Not reported when this argument was written.

"A very serious economic and political question is, whether this free country has not made a mistake in giving too much liberty of railroad construction. Take a single illustration: In the State of Colorado, between Pueblo and Denver, are three distinct independent lines of road, with separate and distinct tracks and rights of way. To say nothing of the waste of lands and the injured farms, the cost of these three lines of road, I am assured, is much more than the cost of a single right of way with two tracks; and such single right of way would be adequate for all the business that the three roads have done, or are likely to do for many years. The public, which uses these roads, bears the burden of this extra cost. Would not its interest have been promoted if by contract or law all these railroads could have been compelled to unite in a single line?"

A union upon any basis saves the waste of lands and cost

of construction; yet the apportionment of the cost necessary may make such construction inequitable to some of the parties. In such cases existing and probable conditions should be considered. In this case, the judge of the Circuit court, in discussing "reciprocal benefits," said: "It, "the Chicago Company, obtained the benefit of de- "fendant's railway by paying a low rate of interest on "one-half the sum it would cost to build an independent "line"—concerning which we remark, that in some remote parts of the Eighth circuit, five per centum per annum may be a low rate of interest; but neither the complainant nor the defendant would have negotiated loans in such localities for the construction of an "inde- "pendent line." All of the money used in the construction of plaintiff's railway west of the Missouri river, including the "Colorado end," was borrowed at five per centum per annum. The railway of the Denver Company between Denver and Pueblo necessarily has a capacity for about twelve times the traffic moved over it by the Rock Island Company. In constructing an "independent line" it would dispense with all second main track and many station, yard and track facilities which it would not need, but which are made necessary to the Denver railroad by the volume of traffic of both companies.

EXCEPTIONS—USE "*Reciprocal benefits.*"

Accepting Mr. Smith's estimate as a basis, the yards at Denver had cost, August 31, 1889, $708,159.14; and if Mr. Burns and the general manager's secretary are to be credited, are now used to their utmost capacity, the Denver Company having 90 per cent. and the Rock Island 10 per cent. of such use. Much smaller yards would answer for the Denver terminals of an "inde- "pendent line" which the Rock Island would construct for its own use. The Pueblo terminals on the day named represented $309,185.04, and in January, 1890, Mr. Smith was anxious to add over $350,000 more. Four and three-quarters per cent. of their capacity is adequate for the needs of the Rock Island, and in the

Abst., p. 118.

EXCEPTION—USES "*Reciprocal benefits.*"

construction of an "independent line" its expenditure for yard facilities at Pueblo would be consistent with its needs.

Abst., p. 49.

In this connection it should be remembered that Mr. Parker's valuation of the railway in December, 1887, between Denver and Pueblo, excluding the thirty acres of land owned at Colorado Springs, was $1,787,111—a sum smaller than that upon which the complainant is now paying interest at the rate of 5 per cent. Mr. Smith's valuation of the same property and three miles additional railroad in Denver and Pueblo was but $2,160,000. The road then had a capacity greater than is to-day needed for the Rock Island traffic. It is quite certain that the capital upon which the Rock Island company is now paying interest would construct a railway from Denver to Pueblo, and furnish terminal facilities at these places amply sufficient for its traffic—a railroad of which it would have absolute control; at the stations of which its business would be managed by its own agents, instead of agents carried on the pay-rolls of a competitor. The construction of such a line would inflict upon the public some of the evils depicted by Mr. Justice BREWER. Yet the reasons which should prompt the legislative action suggested by the learned Justice should not be forgotten in the construction and enforcement of contracts for joint use.

Public policy.

Hitherto we have considered the contract mainly with regard to the rights and interests of the parties to the suit. The Denver and Rock Island companies are not the only parties interested, or theirs the only interests which should receive the attention of the court. We have already called attention to the significant suggestion of Mr. Justice BREWER, as to the interests of the public regarding the consumption of land for right of way for railways which could handle their traffic on existing lines, and also to the increased burden placed upon the public by the investment of capital in the construction of such railways. The principle upon which these suggestions rest was declared by Mr. Justice FIELD, speak-

ing for this court, in *Woodstock Iron Company* v. *Richmond and Danville Extension Company*. By the contract before the court it was agreed that a consideration should be paid to a construction company for the location and construction of a railway by way of a given point, which would make a longer route than was necessary, and impose upon the public higher rates for transportation. Said the learned Justice:

EXCEPTIONS—USE

Public Policy.

"The business of the Extension company was one in which the public was interested. The railways are for many purposes, public highways. They are constructed for the convenience of the public in the transportation of persons and property. In their construction without unnecessary length between designated points; in their having proper accommodations; and in their charges for transportation, the public is directly interested. Corporations, it is true, formed for their construction, are private corporations; but whilst their directors are required to look to the interests of their stockholders, they must do so in subordination to and in connection with the public interest, which they are equally bound to respect and subserve. * * * In this case the Extension company, to which the duty of locating and constructing the railroad between its *termini* was intrusted, in agreeing, for a consideration offered by a third party to disregard that duty and locate and construct the road by a longer oute than was required, not only committed a wrong upon ther railroad company by thus imposing unnecessary burdens upon it, and to meet which large charges for transportation might be called for; but also a wrong upon the public."

Woodstock Iron Company v. The Richmond and Danville Extension Company, 129 U. S. Rep., 656.

The doctrine was again declared by the Circuit court in the Joy case, which was affirmed by this court. In the opinion of this court, delivered by Mr. Justice BLATCHFORD, it is said:

Joy v. St. Louis, 138 U. S. Rep., 50.

"Railroads are common carriers and owe duties to the public. The rights of the public in respect to these great highways of communication should be fostered by the courts; and it is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interests of the public in the progress of trade and traffic by new methods of intercourse and transportation."

The proposition announced in the above mentioned cases is abundantly sustained by numerous authorities, among which is the decision of the Supreme court of Oregon in *Halliday* v. *Patterson*. The plaintiff, being the President of the Oregon and California Railroad Company, agreed with the defendant that in consideration of a

Halliday v. Patterson, 5 Or. Rep., 177.

EXCEPTIONS—USE *Public Policy.*

certain sum of money he would cause the line of said road to be located on a certain route and the depot to be built at a certain place instead of adopting another route then surveyed which was shorter and over which said road could be constructed at less expense. This contract was held void as against public policy. The court said:

"The directors of the company were clothed by law with the power of locating their line of road and depots. What is the nature of that trust? As has been heretofore remarked, they were acting for the company, but they were also acting for the public, and if the public have an interest in the route selected for a railroad, being the nearest and best, and the depots located so as to best answer the convenience of the traveling public, would the contract entered into by the appellant, Ben Halladay, with the respondent, by which they were to receive money to adopt the route by Eugene City, instead of the route by Springfield, which was a shorter route, and over which the road could be built at a less expense, have a tendency to make them disregard either the interests of the company or of the public? If so, it cannot be enforced, for an agreement which is designed, or which in its nature and effect tends to lead persons who are charged with the performance of trusts and duties for the benefit of others, to violate or betray them is contrary to public policy. That the public have an interest in the location of the line of all railroads, as well as their depots, I think cannot be disputed."

Fuller *v.* Dame, 18 Pick. 472.

In *Fuller* v. *Dame*, Dame was the owner of lands which would be enhanced in value if a certain railroad should locate its depot near by, and in order to secure such location it was necessary to form a stock company to purchase grounds to be given to the railroad corporation for their depot: plaintiff agreed to aid in getting up such a company, and in causing the corporation to fix its depot on the property, for which services the defendant was to pay him a pecuniary compensation. This contract was held void as against public policy. The court says:

"It is obvious that if one large land holder may make a valid conditional promise to pay a large sum of money to a stockholder or influential citizen, on condition that a work of great public improvement may be so fixed as to enhance the value of his estate, all other great land holders may make like promises, on similar conditions, and great public works, which should be conducted with a view to the public interest, and to the just right of those who make advances for the public benefit, would be in danger of being overlooked and sacrificed in a mercenary conflict of separate local and private rights."

Other cases are referred to in the side notes.

EXCEPTIONS—USES.

Public Policy.

Pacific Railroad v. Seeley, 45 Mo. Rep., 212.

Marsh v. Falling, 64 Ill., 414.

St. Louis Railroad Company v. Matthews, 71 Ill., 502.

St. Joseph Railroad Company v. Ryan, 11 Kansas, 602.

It is now solemnly averred by the defendant and adjudged by the Circuit court, that in the negotiations which preceded this contract and in the contract itself, the Chicago Company covenanted to abandon the construction or acquisition of the Denver branch, and to carry all of its through traffic by way of Colorado Springs, over a line of which 41 per cent. of seventy-five miles is on a grade of seventy-five feet in a mile, and which is sixty-four miles longer than the direct route on which the maximum grade is sixty feet in the mile. If these averments are true, and this adjudication is correct, there is a breach of the contract if the Rock Island Company operates any branch between the railway of its predecessor, the Chicago Company, and Denver, though its traffic is carried into other yards than those of the Denver Company at Denver. An affirmative obligation to carry all traffic by way of Colorado Springs is alleged. Will this court, in the light of the decisions above mentioned, be ingenious to find such an agreement in the vague "understandings" and "impressions" of Edward O. Wolcott, David H. Moffatt and Sylvester T. Smith, or in the language of article III, section 10 of the contract? Such finding would develop a contract which is void as against public policy; and the rule is, that a construction which will avoid an agreement will not be accepted as against one equally reasonable and consistent with its validity under the law.

Abst., pp. 109-118.

An effort was made to show, especially by the testimony of the defendant's superintendent of transportation and the secretary of its general manager, that the direct line from Limon has not materially increased the volume of complainant's traffic to and from Denver. This testimony has been incorporated in this abstract, and will not be repeated here. Each witness contradicts himself, the statistics furnished by the defendant's auditor, and the common sense of the proposition that traffic can be carried more rapidly, more satisfactorily, and at lower rates over

EXCEPTIONS—USES.
Public Policy.

a short line with low grades than over a longer one with higher grades. The secretary assumes that all the traffic which the Rock Island now carries could be secured and carried by way of Colorado Springs, and that it would increase the Rock Island's proportion of the wheelage on the Denver railroad $31,000 per year. Yet it is admitted that the shorter way secures business which could not be controlled for the longer route. The Rock Island pays trackage charges which it guarantees shall not be less than $50,000 per year for the right to operate its trains over the tracks of the Union Pacific direct between Limon and Denver. If the same volume of traffic could be controlled and carried at the same rates and expense, by way of Colorado Springs, the Rock Island would pay to the Denver Company $31,000 per year instead of $50,000 per year to the Union Pacific. The difference of $19,000 per yer is paid for advantages which the one line has over the other. These advantages consist in the shorter through line and lower grades, with the resultant reduction of operating expenses which make lower rates without a corresponding reduction of profits.

Decree.

We respectfully submit that the decree of the Circuit court is inconsistent with itself, and with the opinion of the learned Judge whose name is affixed to it. It adjudges that the "complainant is not entitled, nor has it "any right to bring its engines, cars or trains over the "tracks of the Union Pacific Railway Company;" and that it "has no right" in said terminal property except for such business as it brings upon said tracks by way of Colorado Springs. It then orders that the said Rock Island Company shall be permitted, on said terminal property, to "handle traffic with its separate employes, and to "perform any other service which can be performed for "it exclusively, *including the handling of traffic received "from or delivered to other railroads by complainant, to "the same extent and as fully in all respects as the defend-"ant may perform like services for itself, and have like use "of the joint property for that purpose*". Complainant

Abst., p. 23.

cannot, with its own motive power, haul its own engines and trains from Limon to Denver and care for them in this yard; but if the same cars and trains are hauled by the motive power of the Union Pacific, under the control of the employes of that company, from Limon to the northern terminus of the railway of the Denver Company in the City of Denver, the Rock Island may there receive them and use the yard in handling them as fully as it could do if they were brought by way of Colorado Springs. It is Rock Island traffic at Limon and at Denver. The difference is in the fact that it is hauled to Denver by another railroad company. In what way this traffic increases the Rock Island's proportion of wheelage on the Denver Railroad between Colorado Springs and Denver is not obvious. In our judgment this is not material under the contract; it is, however, under the theory of the defendant and of the Circuit court.

EXCEPTIONS—USE *Decree.*

(II.) *As to the right of the complainant to use its own motive power and employes in the defendant's yards at and between Denver and Pueblo.*

The Circuit court sustained, in the main, the complainant's contention. The complainant appeals from so much of the order as provides that the operation in the yards shall be under "the sole and absolute supervision and "control" of the yard master of the defendant; and further complains of the refusal of the court to recognize in connection with such control by the defendant's superintendent, the right of the complainant to demand his removal at any time as provided by the contract. The defendant recognized this right by averment solemnly made in the amended answer. It objects to all of the orders of the decree in regard to such subject-matter.

SEPARATE MOTIVE POWER AND EMPLOYES.

The questions covered by this portion of the decree were first raised early in 1889. On the 16th of February in that year the Denver Company submitted to Mr. Cable, the president of the company which was operating the road, a construction of the contract in this regard. It is in the form of questions and answers, the answers

SEPARATE MOTIVE POWER AND EMPLOYES.

being prepared "after conferring with our general counsel." The second question was as follows:

Abst., pp. 13 and 14.

"Under the contract are the C. K. and N. switch engines allowed to do work in the Colorado Springs yard, or should all switching, including transfers to Midland, be done by the D. and R. G. switch engines; and does the Colorado Springs yard stand upon any other basis than those at Pueblo and Denver?"

The answer given "after conferring with our general counsel," was:

"The C. K. and N. Company has the right, if it desires to do so, to do work in the Colorado Springs yard with its switch engines, and to do all the necessary switching for that company with its own engines; but this can only be done under the direction and instructions of the superintendent or other designated officers of the D. and R. G. Company. The same rule applies to this as to query one, that all movements of engines, trains and cars must be under the sole direction of the superintendent or designated officer of the D. and R. G. There can be no divided authority in regard to the movement of engines, trains and cars. In this respect the yards of Pueblo and Denver are subject to the same principle."

On the 22d of the same month Mr. Cable answered:

"We have acted under the theory that the movement of trains on your tracks must be under the direction of your operating officers; that operations in the yards must conform to reasonable yard rules; and that in all other respects we must have exclusive control of our engines and trains."

On the 26th Mr. Smith answered:

"This company is at all times ready and willing to unite with you in making and modifying rules and regulations for the movement of engines and trains in such way as to accord equality of right, privilege and advantage, so far as practicable; but in the execution of these rules there can be no divided authority."

Here was a construction of the contract under the advice of the general counsel of one of the parties. The principle thus approved and settled applied to car cleaners, freight agents and handlers, and to every class of employes except those who could not serve one without serving the other. No attempt was made to unsettle this construction until April, 1890, and after the arrangement was made to operate direct from Limon as well as by way of Colorado Springs. Three conversations occurred in that month between Mr. Smith, general manager of the

Abst., p. 119.

SEPARATE MOTIVE POWER AND EMPLOYES.

Denver Company, and Mr. St. John, the general manager of the Rock Island. There is a controversy between the witnesses as to what was said in regard to the right under the contract; but this is not material, for the reason that the views of the parties were expressed in writing. On the 26th of April, Mr. St. John telegraphed Mr. Smith: "Do I understand you to take the position "that we have no right to do the work of car cleaning "and the necessary cleaning of our engines at Burnham, "with our own forces, if we so elect? We are not satis- "fied with the work as now done either at Burnham or "South Pueblo." To this direct question, Mr. Smith sent an answer on the 29th: "If you so elect, you have "the right, at your own expense, with your own men "and your own tools to clean your own cars and engines." Here is an express recognition of the application of the rule stated, after "consulting with our general counsel." In February, 1889, Mr. St. John went to Pueblo and arranged to have the cars and engines of the Rock Island company cleaned by its own employes on what were known as cleaning tracks; and the arrangement then made has continued to this day, resulting in a reduction of expenses for that item alone equal to $150 per month. He then returned to Denver to make similar arrangements; and was told that if he attempted it, his employes would be ejected by force. Mr. St. John, Mr. Allen, Mr. Verbryck and Mr. Wilson substantially agree that Mr. Smith declared that if the attempt was made, "contract "or no contract, we won't permit you to do it." Mr. Smith explains his telegram by saying that he intended to admit the right in the yards outside of Burnham shop grounds; but Mr. Moffat was summoned to contradict Mr. Allen, and says that in the conversation with St. John after his return to Denver, Mr. Smith "did con- "tend that the plaintiff company had no right to intro- "duce its own employes into the *Denver yards* for the pur- "pose of cleaning its coaches." The witness contradicts Mr. Smith quite as emphatically as he does Mr. Allen.

Abst., p. 120.

SEPARATE MOTIVE POWER AND EMPLOYES. Abst., p. 16.

This was followed by a refusal to permit any track in Denver, including Burnham, to be used for that purpose. This interview was repeated to Mr. Cable, who, upon the 3d of May, by letter, requested Mr. Smith "to state ex- "plicitly whether or not you propose to refuse to allow "our employes to clean our cars standing upon your "tracks *at or near Denver?*" He also advised him that General Superintendent Allen had been instructed "to "take up with your superintendent, the matter of switch- ing and handling freight *at Denver*, with a view to having "it done by our own employes more economically and "satisfactorily."

The court will observe that the cleaning of coaches is not a duty necessarily performed for *both* companies by the same employes, in the joint occupation and use of the railway. The same is true as to the handling of freight. A Rock Island car can be cleaned by one man and a Denver car by another: a crate of freight hauled by one company may be taken from the car by one set of freight handlers, and another crate hauled by the other by another set.

Reference.

Abst., p. 16.

In reply to the Cable letter Mr. Smith refused to join in making any rules and regulations with a view to having "your freights *at Denver* switched or handled by "your employes." The court will remember that the right to switch with its own motive power and employes was settled by the agreed construction of the contract made in the correspondence of February, 1889, and the right to clean cars outside "the shops at Burnham" was conceded as Mr. Smith admits in April, 1890. He now receded from the construction which he had, "after con- sulting "with general counsel," placed upon the contract, and these were the reasons assigned:

(1.) The coach tracks are a part of Burnham shops.

(2.) The traffic over the Union Pacific is not in the contract.

(3.) Because of the impracticability of having two

sets of men under different supervision working in the same yards and warehouses.

SEPARATE MOTIVE POWER AND EMPLOYES.

These were the reasons assigned at that time. Mr. St. John had requested that tracks outside the so-called "shops" be set apart for cleaning, and this had been refused. If the fact was that the coach tracks which had been used were inside the "shops" would that afford any reason why the superintendents should not confer with a view to arranging for such cleaning on others outside?

It is difficult to discover the relevancy of the Union Pacific traffic to the matter of cleaning coaches or the operating of the yards by separate motive power and separate sets of employes. If all that Mr. Smith claims was conceded, how would it affect complainant's right to clean its own cars and move them with its own motive power? As to the alleged impracticability—there was no proposition for separate supervision submitted and none would have been as to the movement of cars and engines in the yard. The location of the "coach tracks" to which Mr. Smith alludes had not been changed in the less than a fortnight which had elapsed after he admitted the right to Mr. St. John.

When the amended answer (which bears the signature of the general counsel who was consulted in February, 1889) was filed, it was claimed that when the contract was signed "it was distinctly understood by the parties "thereto that this defendant would employ all persons who "should be engaged in the joint service of the two com- "panies, including switchmen and other yard employes"; and that with a view to this understanding, section 2, article 11. was incorporated in the contract. This was not among the reasons assigned for refusing the request made by Mr. Cable. The "general counsel" who was consulted in February, 1889, was the one who represented the Denver Company in the negotiations and in drafting the contract. The alleged agreement was quite as effective to defeat the claim in February, 1889, as on the

Abst., p. 92.

SEPARATE MOTIVE POWER AND EMPLOYES.

4th day of November, 1890, when the amended bill was filed. Had it been forgotten in 1889? Was it an afterthought in 1890? The alleged contract was quite as applicable to Denver as to Pueblo, yet the right was conceded as to and is exercised in Pueblo.

Abst., p. 10.

But the learned counsel rely with much apparent confidence upon the sixth clause, section 2, article III which makes provision for the contribution of the parties to the payment of the expenses of joint operation and maintetenance on the basis of wheelage.

"An amount equal to a proportional share of the expenses actually incurred in paying proper salaries to the general superintendent and subordinate employes including switchmen, telegraph operators, train dispatchers and others necessarily employed in the performance of the duties incident to the joint use and occupation of said railway, not including trainmen; which proportion shall be ascertained in the manner provided in paragraph number 4 above set out.

In connection with this is presented the ninth clause, same section, which requires the Denver Company to furnish to the Chicago Company copies of pay rolls and vouchers.

Abst., p. 10.

Salaries are to be paid jointly to officers and employes "necessarily employed in the performance of duties *in-*"*cident to the joint use and occupation of said railway.*" The general superintendent has supervision of everything that is done on the railway and appurtenant property, and of course performs duties, "incident to the" movement of the engines, cars and trains of both companies. Certain switchmen have charge of certain switches, and open and close them for all engines which pass; and these switches can be managed in no other way. That these should be managed, each by one switchman, is essential to safety; and such switchmen "are "necessarily employed in the performance of duties inci-"dent to the joint use and occupation of the railway." Telegraph operators and train dispatchers are especially connected with joint operation of the road; but this is not true of an engineer on an engine in the yard more than of the one on an engine on the road. He may manage

the engine which hauls the cars of one company without having any duties concerning the cars of the other. The car cleaner may clean the cars of one without having anything to do with those of the other, and especially is this true of the clerks and employes who handle and care for freight.

SEPARATE MOTIVE POWER AND EMPLOYES.

But it is argued that the court should infer that the parties did not contemplate the use of separate motive power and separate employes, because it will not be presumed that practical men contracted to do that which is impracticable. If by "impracticable" is meant "impossible," the proposition will not be questioned; if it is taken as the equivalent of "inconvenient," it is denied. Any corporation or natural person who takes another into the joint occupation and use of its property subjects itself or himself necessarily to inconvenience, which is considered in fixing the rental. Nine witnesses testified that it is "impracticable" to use the motive power and employes of separate companies in a yard like the one at Denver, even under the supervision of the yardmaster of one of the parties. Five were of the opinion that the supervision of one yardmaster would remove some of the objections to such operation, without making it entirely satisfactory. Thirteen witnesses testified that under such supervision such operation is entirely feasible and practicable. Of the first nine several admitted that they had had no experience in such operation, and that by "impracticable" they meant "inconvenient" and additionally expensive. These witnesses are introduced as experts to testify to opinions, which are of little value in the scale against experience. The testimony shows that systems of tracks more complicated at Pueblo, Kansas City, Chicago and Toledo are being operated by several companies, in some cases with and in some without one supervision. Mr. Thomas testified that over a crossing of double tracks on the St. Charles Air Line in the city of Chicago, six different companies, without a common supervision, make about three hundred different move-

"Impracticable."

Abst., pp. 123-134.

SEPARATE MOTIVE POWER.

ments of trains in one day, and that this does not cover the entire use of the crossing.

Insufficient Capacity.

It is also said that the yard is not of sufficient capacity for such operation. The yard, according to Mr. Smith's estimate, represents a cost of over eight hundred thousand dollars, over one hundred thousand dollars of which has been expended since this contract became operative. The contract also contains ample provision for increasing its capacity. Without regard to this, what effect could this have if the claim was conceded, upon the "full, equal and joint possession and use"?

The same is applicable to the suggestion that the yards are so arranged as to make the management of traffic coming from the south or west more convenient than for traffic coming by way of the Union Pacific. If the complainant can get along with the inconvenience created by the alleged conditions, the defendant should not complain while it continues to enjoy over nine-tenths of the use. Inconvenience, or even hardship or difficulty in the performance of a contract will not excuse its non-performance. The parties are presumed to have understood the situation, and the presence or absence of difficulties incident to the performance of the contract when it was made.

Gilpin *v.* Consequa, Pet. C. C. Rep., 86.

Dermott *v.* Jones, 1 Wall, 77.

The court will please bear in mind that this defendant, in connection with the Burlington and Missouri River and the Missouri River Railway Company is a competitor against the complainant for through traffic at Denver and Pueblo. It has a direct interest to be promoted by throwing obstacles in complainant's way, first in securing such traffic, and second, in promptly handling it after it is secured. One of its officers in assigning objections to the employment of separate freight agents in the yard, stated that it would create contention in securing business. The suggestion is entitled to careful consideration. When the rival interests of competitors may breed contention, the management of the entire interest should be placed in the care of one! Thereby would be pro-

moted the unity which existed between the wolf and the lamb; peace would prevail, but it would be the peace that once reigned in Warsaw.

REMOVAL OF EMPLOYES.

(III.) *As to the right to demand absolutely the removal of any employe engaged in the joint operation of the line.*

Abst., p. 11.

Article III, section 3, of the contract is as follows:

"Any employe of one company engaged in the operation of any part of the railway jointly occupied and used under this contract, shall be removed from that portion of said line upon the request of the other."

The complainant demanded the removal of certain employes, and compliance with the demand was refused. In the taking of testimony and on the hearing this refusal was justified upon the ground that the demand was not sustained, in the judgment of the general manager of the Denver Company, by good and sufficient reasons; the general manager declaring, as a witness, that he never would remove an employe in compliance with such demand unless it was supported by reasons which were satisfactory to him. Mr. Wolcott, in a printed argument submitted on the hearing in the Circuit court, said:

Defendant's Additional Argument in Cir. Ct., p. 18.

"Counsel for complainant insisted in the Denver argument that it was the imperative duty of defendant to immediately discharge any employe on joint tracks upon request by the complainant, whether any reason existed for the request or not, and without reference to the fitness or unfitness of the employe. We do not care to discuss such a proposition. In our opinion section 3 requires that the request should be a *reasonable* request. If this is not its meaning, then any employe on the joint track is at the mercy of the Chicago Company, and all discipline and encouragement towards good service are at an end among the employes on joint track, all of whom are employed by the Denver Company, and who render that Company about 93 per cent of their whole service."

In the final decree the court recognized our right to use our own motive power and employes in the yards, assigning as a reason therefor that the defendant had so interpreted the contract in the letter of February 16, 1889. The decree provided, that the operation of all switching engines shall be "under the *sole* and *absolute* "supervision, *direction and control*, however, of the yard-"master or other properly constituted officer or agent of

REMOVAL OF EMPLOYES.

8

"the defendant." We humbly requested that the language of the contract, "under the *immediate* direction of "the superintendent or other officer duly authorized," instead of the language of the letter, be used; but this was denied. We then asked the court to recognize the right secured by section 3, to demand the removal of the officer who was thus vested with "sole and absolute super-"vision, direction and control," but the court gave us instead a "glittering generality"—"which orders and in-"structions shall be given and executed in good faith "and without discrimination, and in accordance with the "provisions of said contract." We then insisted that under the general scope of the prayer, and especially the prayer for general relief, we are entitled to an order restraining defendant from keeping in the joint service of the parties any employe whose removal is demanded, and this was refused.

This brings us to the consideration of the proposition which Mr. Wolcott "did not care to" but finally did discuss. "In our opinion, section 3 requires" what its language and the "reason of the thing" implies. If the word "reasonable" is to be interpolated in the section, why did not "the general ccounsel" for the Denver Company place it there when he was settling the contract; and why did he not also make this section name the tribunal which should pass upon the reasonableness of the request? Mr. Smith declares that he exercises that power; but we do not find the warrant for his authority in the language of the contract. It is quite true that "any employe on joint tracks" whose duties pertain to the joint operation of the property is at the "mercy of "the Chicago Company"—and of the Denver Company as well. The contract prescribes the same rule for both. The employes are in the service of both companies, and in the pay of both. Should either have the power to force upon the other an obnoxious servant? Is it usual for a joint employer to arrogate to himself this sole power to employ and discharge agents? May one partner re-

fuse to discharge an employe of the firm when such a discharge is demanded by another partner, because in his judgment the reasons assigned for such demand are not reasonable? While it is true that the Denver Company has ninety-three per cent. of the service of these employes, it is in the operation of a property one-half of the beneficial use of which is owned by the complainant. Does the fact that defendant enjoys 43 per cent of the capacity for which complainant pays give to defendant absolute power as to the discharge of joint employes? Is this a part of the "reciprocity" which received the admiration of the Circuit court?

REMOVAL OF EMPLOYES.

It is said virtually by the learned counsel that if one of the joint operators of this property is not invested with power to retain employes in the joint service against the protest of the other "all discipline and encouragement "towards good service are at an end on joint tracks." What "good service" would be secured to this complainant by having it understood among the joint employes that the defendant alone can employ them and pass upon the sufficiency of the reasons for their discharge? The parties are operating this line in some degree in competition with each other. To which will the employes be most loyal—the party who employs and discharges, or the party who is utterly powerless as to either?

The court, in its decree, has recognized a right as secured by the contract, to be exercised however, "under "the sole and absolute supervision and direction and con-"trol of the yardmaster or other properly constituted "officer or agent of defendant." If that officer can be employed or discharged only by the defendant, his sole absolute control will be the absolute control of the defendant. This is the discipline defendant desires.

As before remarked, we insist upon the execution of this power granted by the contract as it is therein written. Either party may exercise it unreasonably—will it do so with the ample opportunities afforded for retaliation? If the employes of the defendant are at the mercy

of the complainant are not the employes of the complainant at the mercy of the defendant? Is it unreasonable to place the employes of all joint employers at the mercy of each employer? In what other way can loyalty to both be secured?

In conclusion the plaintiff, bearing fifty per cent of the value of this property and enjoying but 7.5 per cent. of its use, insists upon a recognition and enforcement of its right to the same "full, equal and joint possession and use" enjoyed by the defendant, subject only to the limitations and restrictions written in words which are unambiguous on the face of the face of the contract.

THOS. F. WITHROW,
THOMAS S. WRIGHT,
A. E. PATTISON,

For The Chicago, Rock Island and Pacific Railway Company.

APPENDIX.

(STATUTES OF KANSAS.)

An act relating to the extension and construction of continuous and connected lines of railroad, and providing for the purchase or lease of railroad property, and the purchase or guaranty of railroad securities in certain cases.

Gen. Stat. Kansas, 1889. p. 445, et seq.

(Took effect Feb. 12, 1887.)

Be it enacted by the Legislature of the State of Kansas:

(1272) CONTINUOUS AND CONNECTED LINES, § 115. Any railroad company existing under any of the laws of this state, or of the territory of Kansas, may construct and extend its line of railroad, into or through any other state or territory, under such terms and regulations as may be prescribed by the laws of such state or territory; and any such railroad company, so existing under any of the laws of this state, or of the territory of Kansas, may purchase or lease the road, constructed or to be constructed, and other property of any railroad company existing under the laws of any other state or territory, with all rights, privileges and franchises thereto appertaining, or may buy the stock and bonds, or either, or guarantee the bonds and interest, or either, of any such Company: PROVIDED, however, that no purchase, lease or guaranty under this act shall be entered into unless the line of railroad so purchased or leased, or the bonds of which are guaranteed, shall when constructed form a continuous line with the road of such Kansas Company, either by direct connection therewith or through an intermediate line or lines constructed or to be constructed, which such Kansas Company shall have the right, by contract or otherwise, when completed, to use or operate, or the principal and interest of whose bonds it has guaranteed, or whose stock in whole or in part it has purchased.

(Laws 1887, Ch. 181, § 1, Feb. 12.)

(1273) SHALL NOT BE CONSTRUED. § 116. This act shall not be construed as repealing any previous act, or as impairing any rights or privileges given or granted thereby; but all extensions, purchases, leases, or guarantees of the character set forth in section one of this act, shall, if already made, upon the ratification thereof by the respective boards of directors of the contracting companies, have the same legal operation and validity to all in-

tents and purposes as if this act had been in force at the time they and and each of them were in fact made.

(Laws 1887, Ch. 181, § 2, Feb. 12.)

(1274) STOCKS OR BONDS. § 117. Any railroad company making extensions or purchases under this act may, conformably to the laws of this state, issue stocks or bonds, or mortgage its property or any part thereof, to such extent as may be necessary to meet the cost of such purchase or extensions.

(Laws 1887, Ch. 181, § 3, Feb. 12.)

This act shall take effect and be in force from and after its publication in the official state paper.

(Laws 1887, Ch. 181, § 4, Feb. 12.)

Approved February 11, 1887. Published February 12, 1887.

(STATUTES OF COLORADO.)

647. *Election—Bond—Term—Conditions—Oath.*

Gen. Stat. State of Colorado, 1883, p. 280.

SEC. 127. (121) A County Assessor shall be elected in each county at the general election, who shall give bond to the people of the State of Colorado, with two or more sufficient sureties, in a penal sum of not less than six thousand dollars, for the performance of his duties according to law, and to the satisfaction of the board of county commissioners, and subscribe an oath or affirmation for the faithful performance of his duties as such assessor, and who shall be a qualified elector of said county, and shall hold his office for two years and until his successor is elected and qualified. (Sec. 1, pp. 99–100, Acts 18[illegible]—Amending Sec. 121 (548) pp. 247–8, G. L. —Approved Feb. 11, 1881—in force May 12, 1881.)

2831. *Listing—owner—guardian—parent—executor—administrator—Receiver—Partner—Agent.*

SEC. 20. (7.) Every inhabitant of this state, of full age and sound mind, shall list all property subject to taxation in this state, of which he is the owner, or has the control or management, in the manner hereinafter directed; but the property of a ward shall be listed by his guardian; of a minor, having no guardian, by his father, if living, if not, then by his mother, if living, and if not, then by the person having the property in charge; of a married woman, by her husband, but if he be unable, neglects or refuses, by herself; of a beneficiary for whom property is held in trust, by the trustee. The property of every deceased person shall be listed by the executor

or administrator. The property of persons or corporations whose assets are in the hands of receivers, shall be listed by such receivers; of a body corporate, company, society or partnership, by its principal accounting officer, agent or partner; property under mortgage or lease shall be listed by and taxed to the mortgagor or lessor, unless it be listed by the mortgagee or lessee. (Sec. 2246 (7), p. 743, G. L.)

2847. Corporation property assessed in county where situated—Railroad property by board of equalization—Returns of railroad officers—Valuation—Duties of county board—Clerk—Board make record—Clerk transmit copy.

Gen. Stat. State of Colorado, 1883. p. 828.

SEC. 36 (12). The property of corporations or companies constructing canals, ditches, flumes, plank roads, gravel roads, turnpike roads and similar improvements, shall be assessed to the company or corporation in the respective counties in which said improvement shall be situated, and railroad property shall be assessed as follows: On the first Monday in April in each year the State Board of Equalization shall meet at the executive office, and they shall meet from day to day thereafter until the business of said board, as hereinafter provided, shall be accomplished. The duties of said board shall be to assess all the property in this state belonging to railway corporations, except lots or parcels of real estate owned by the road within each county, and improvements thereon, and except depots, machine shops, and other improved property connected with said road and located in any county which shall be taxed in the county where situate. The president, vice-president, general superintendent, auditor or other general officer of any corporation operating any railway in this state, shall furnish said board, on or before the fifteenth day of March in each year, a statement signed and sworn to by one of such officers, showing in detail for the year ending on the thirty-first day of December preceding: first, the whole number of miles owned, operated or leased in the state by such corporation making the return, and the value thereof per mile, with a detailed statement of all property of every kind and the value located in each county in the state; second, also a detailed statement of the number and value thereof of engines, passenger, mail, express, baggage, freight and other cars, or property owned by such railway, and on railways which are a part of lines extending beyond the limits of this state; the return shall show the actual proportion of the amount and

full cash value of the rolling stock in use on the corporation's line which is necessary for the transportation of the freight and passengers, and the operation of the railroad in this state during the year for which the return is made. The return shall also show the amount and value of property hereinafter designated in this section, and such further information shall be furnished as the board may in writing require. If said officers fail to make such statement, said board shall proceed to assess the property of the corporation so failing, and shall add thirty per cent. to the value thereof as ascertained and determined by the said board. The said property shall be valued at its full cash value, and assessments shall be made upon the entire railway within this state, and shall include the right of way, road-bed, bridges, culverts, rolling stock, depots, station grounds, buildings and all other property, real and personal, exclusively used in the operation of such railway. In assessing said railway and its equipment, said board shall take into consideration all matters connected with said road necessary to enable them to make a just and equitable assessment of said railway property. On or before the 15th day of April, in each year, said board shall transmit to the county clerk of each county through which any railway may run, a statement showing the length of the main track of such railway within the county, and the assessed value per mile of the same as fixed by a *pro rata* distribution per mile of the assessed value of the whole property herein specified; said statement shall be entered on the proper record of the county. At the first meeting of the board of county commissioners held after said statement is received by the county clerk, they shall make, and cause the same to be entered in the proper records, an order stating and declaring the length of the main track and the assessed value of such railway lying in each municipal corporation within their county through which said railway runs, as fixed by the above named board, which shall constitute the taxable value of said property for taxable purposes; and the county clerk shall transmit a copy of said order to the city council or trustees of such municipal corporation. All such railway property shall be taxable upon said assessment by the same officers and for the same purposes as the property of individuals within such counties and municipal corporations. (Sec. 2251 (12), pp. 744–6, G. L.)

Gen C

2870. County board furnish blanks—Instructions.

Gen. Stat. State of Colorado, 1883. p. 837.

SEC. 59 (25). Before the first day of April in each year, the county commissioners of each county shall

cause to be furnished to the assessor, suitable blank forms for assessment, and such instructions as shall be necessary to secure full and uniform assessments and returns. (Sec. 2264 (25), p. 751 G. L.)

2878. Of whom board shall consist—When and where meet.

Gen. Stat. State of Colorado, 1883. p. 839.

SEC. 67 (42). The state board of equalization shall consist of the governor, secretary, auditor, treasurer of the state and the attorney general. They shall sit at the office of (the) secretary of the state, at the capital on the second Monday of August of each year, and are hereby authorized to and required to examine the various assessments, so far as regards the state tax, and equalize the rate of assessment in the various counties, whenever they are satisfied that the scale of valuation has not been adjusted with reasonable uniformity by the different assessors. (Sec. 2281 (42), p. 756, G. L.)

UNITED STATES OF AMERICA:

In the Supreme Court.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Complainant and Appellant,
vs.
THE DENVER AND RIO GRANDE RAILROAD COMPANY, Defendant and Appellee.
} No. ~~1695.~~ 1095

THE DENVER AND RIO GRANDE RAILROAD COMPANY, Defendant and Cross-Appellant,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Complainant and Cross-Appellee.
} No. ~~1711.~~ 1109

Whereas in the printing of the record in the above-entitled case there was by inadvertance omitted therefrom two certain notices of special meetings of the Chicago, Rock Island and Colorado Railway Company in said record referred to, the same having been duly introduced in evidence, it is hereby stipulated and agreed by the parties hereto that the said notices so omitted are as follows, to wit:

"*Special Meeting of Stockholders of the Chicago, Rock Island and Colorado Railway Company.*

A special meeting of the stockholders of the Chicago, Rock Island and Colorado Railway Company will be held at room 38 Chessman block, in the city of Denver, State of Colorado, on Monday, the thirtieth day of April, 1888, at 10 o'clock in the forenoon, for the purpose of considering a certain agreement between the said Chicago, Rock Island and Colorado Railway Company and the Denver and Rio Grande Railroad Company for the joint use of the tracks and property of said Denver and Rio Grande Railroad Company between the cities of Denver and South Pueblo, in the State of Colorado, and for the purpose of determining whether such agreement shall or shall not be assented to and perfected.

By order of the board of directors:

R. R. CABLE, *President.*

C. A. CHISHOLM,
Assistant Secretary.

Special Meeting of Stockholders of the Chicago, Rock Island and Colorado Railway Company.

A special meeting of the stockholders of the Chicago, Rock Island and Colorado Railway Company will be held at room 38 Cheesman block, in the city of Denver and State of Colorado, on Tuesday, the first day of May, 1888, at 10 o'clock in the forenoon, for the purpose of considering and ratifying or otherwise acting upon an agreement

for consolidation of said Chicago, Rock Island and Colorado Railway Company with the Chicago, Kansas and Nebraska Railway Company.

By order of the board of directors:

R. R. CABLE, *President.*

C. A. CHISHOLM,
Assistant Secretary."

And it is hereby stipulated and agreed by and between the parties to this cause that the said notices hereinabove set forth are the notices referred to at folios 263 and 264 respectively, on page 272 of the printed record now on file in the Supreme Court in this cause, and that the said notices as set out in this stipulation may be considered in all respects by the court as if they had been printed in the record in connection with the minutes of meetings on page 272 of said record.

It is further stipulated and agreed by the parties that the said meeting of stockholders of the Chicago, Rock Island and Colorado Railway Company at which the articles of consolidation between that company and the Chicago, Kansas and Nebraska Railway Company were ratified and adopted was held in pursuance of the second of the notices above set forth, and that no other or different notice of such meeting was published.

WOLCOTT & VAILE,
Attorneys for Defendant, Cross-Appellant and Appellee.
THOS. F. WITHROW,
Attorney for Complainant and Cross-Appellee.

In the Supreme Court of the United States.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Complainant and Appellant, *vs.* THE DENVER AND RIO GRANDE RAILROAD COMPANY, Defendant and Appellee.	Appeal. No. 1695.
THE DENVER AND RIO GRANDE RAILROAD COMPANY, Defendant and Cross-Appellant, *vs.* THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Complainant and Cross-Appellee.	Cross-Appeal. No. 1711.

Whereas Defendant's Exhibits "Y" and "Z" introduced in evidence in the above-entitled causes have not been printed in the record, it is hereby stipulated and agreed by and between the parties that in lieu of the said exhibits the following rule printed in them and each of them shall be considered as part of the evidence and of the record in said proceeding, to wit:

"Rule 69. Said agents will use all exertion to ticket passengers, but in no case sell tickets to a station at which the train does not stop."

THOS. F. WITHROW,
For Appellant, The Chicago, Rock Island, and Pacific Railway Co.
WOLCOTT & VAILE,
For the Denver & Rio Grande Railroad Company.

[Endorsed:] Supreme Court U. S. 1891, October term. Nos. 1095 & 1109. The Chicago, R. I. & Pacific Railway Co., app't, *vs.* The Denver & Rio Grande R. R. Co., & The D. & R. G. R. R. Co. *vs.* The C., R. I. & P. R. R. Co. Stipulations & additions to record.

[Stamped:] Office Supreme Court U. S. Filed Jan. 6, 1892. James H. McKenney, clerk.

Office Supreme Court, U.S.
FILED
OCT 26 1891

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1891.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Complainant and Appellant,
vs.
THE DENVER AND RIO GRANDE RAILROAD COMPANY,
Defendant and Appellee.

No. ~~1695~~ 1095
APPEAL.

THE DENVER AND RIO GRANDE RAILROAD COMPANY,
Defendant and Cross-Appellant,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Complainant and Cross-Appellee.

No. ~~1711~~ 1109
CROSS APPEAL.

Appeal and Cross Appeal from the Circuit Court of the United States, District of Colorado.

ABSTRACT OF RECORD BY THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, PLAINTIFF AND APPELLANT.

THOMAS F. WITHROW,
THOMAS S. WRIGHT AND
A. E. PATTISON,
FOR PLAINTIFF AND APPELLANT.

IN THE

Supreme Court of the United States.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, *Appellant,*
vs.
THE DENVER AND RIO GRANDE RAILROAD COMPANY, *Appellee.*
APPEAL.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, *Cross Appellant,*
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, *Cross Appellee.*
CROSS APPEAL.

Appeal and Cross Appeal from the Circuit Court of the United States, District of Colorado.

Abstract of Record by the Chicago, Rock Island and Pacific Railway Company, Plaintiff and Appellant.

This suit was instituted by The Chicago, Rock Island and Pacific Railway Company against the Denver and Rio Grande Railroad Company, to enforce a contract entered into under date of February 15, 1888, between the last named corporation and the Chicago, Rock Island and Colorado Railroad Company—the Chicago, Rock Island and Pacific company, claiming that it is invested with the rights of the Chicago, Rock Island and Colorado under said contract by a certain lease, consolidation, conveyance and assignment.

When the contract was executed, The Chicago, Rock Island and Pacific Railway Company (hereinafter referred to as the Rock Island company), owned and oper-

Rock Island Company.

ROCK ISLAND COMPANY.

Cable's dep., Rec., p. 887, fols. 1-5.

ated a line of railway which extended from the city of Chicago, in the State of Illinois, by way of Davenport, in the State of Iowa, to Council Bluffs, in said state; and from Davenport, by way of Altamont, in the State of Missouri, to Leavenworth and Atchison, in the State of Kansas. It operated, as lessee, a railroad extending from Cameron, in the State of Missouri, on its line last above mentioned, to Kansas City, in said state.

ST. JOSEPH COMPANY.

The St. Joseph and Iowa Railroad Company (hereinafter referred to as the St. Joseph company) was incorporated under the laws of the State of Missouri, and owned and operated a railway which extended from Altamont by way of St. Joseph, to Rushville, a point on the Missouri river, opposite the city of Atchison, in the State Kansas. The Rock Island Company owned all of the capital stock of the St. Joseph company, the railway of which was made a part of the Rock Island system by contract.

KANSAS COMPANY.

Charter and Amended Charter. Rec., pp. 163-167.

The Chicago, Kansas and Nebraska Railway Company (hereinafter referred to as the Kansas company), was incorporated under the laws of the State of Kansas early in 1886. The statutes of that state, which constituted a part of its organic law, authorized it to construct branches and extend its lines into other states. On the 15th day of May, 1886, it entered into a contract with the Rock Island Company, whereby it sold to said company all of its first mortgage bonds, all of its capital stock which should not be subscribed and paid for by other parties, and all local aid which it should receive, in consideration for which that company undertook to furnish all moneys which should be needed in constructing and equipping its railway. In the performance of that contract, the Rock Island Company did furnish all moneys needed for the purposes named, received the aid and bonds mentioned and over twenty-four-twenty-sevenths of its capital stock. On the same day and as part of the same transaction, the Kansas Company executed a lease to the St. Joseph company, whereby it let to said com-

Cable's dep., Rec., p. 887.

Lease, Kansas Company to St. Joseph Company, Art. 1, Sec. 2, Rec., pp. 168-176, fol. 35 and 36.

KANSAS COMPANY

pany, for a term of nine hundred and ninety-nine years, all of the railroad "which is now or may hereafter be owned by it, * * * together with all of the rights, privileges and franchises of which it * * * is now possessed, or which may hereafter inure to it with regard to said railroad, or any extension thereof or branches therefrom." In the preamble the lessor declares that, "it desires to secure the operation of its railway in close connection with, and as a part of the St. Joseph and Iowa railroad, to the end that it may constitute a part of the railway system of the Chicago, Rock Island and Pacific railway for the transportation of through traffic." The purpose of the St. Joseph company to "extend its line into the State of Kansas and the adjoining states and territories" is also declared. The leased property was to be delivered to the lessee in sections of ten miles, as the same should be completed to the satisfaction and approval of a civil engineer selected and nominated by the president of the Rock Island company. It expressly authorized the St. Joseph company, to assign and transfer its interest, in this contract by a mortgage or other conveyance of its railway and its railway property.

Lease, Kansas Company to St. Joseph Company.
Rec., p. 169, first and last paragraph.

Art. I, Sec. 2.
Rec., p. 170, fol. 38.

In February, 1888, the Kansas company had completed several hundred miles of its railway in Kansas and Nebraska. One of its initial points was opposite St. Joseph and another at Kansas City, Missouri.

Art. III, Sec. 17.
Rec., p. 175, fol. 63.
Cable's dep.
Rec., p. 888, fols. 7-8.

The Denver and Rio Grande Railway Company (hereinafter refered to as the Denver Company) existed under the laws of the State of Colorado, and owned and operated about fifteen hundred miles of railroad in that state. All of this, except less than one hundred and thirty miles of main track, was south and west of Pueblo, at which point the southern and western lines united. All traffic between points north and east and points south and west of Pueblo passed through the yard which extends through Pueblo and South Pueblo.

Moffat's affl.
Rec., p. 936, fols. 206-208.

DENVER COMPANY.

Middleton's dep., Rec., pp. 211-213; fols. 10-16; and *Middleton's Exhibit No. 1.*, Rec., p. 224.

At the date named the Denver Company had two yards at Denver—one near Chrery Creek, the northern

DENVER COMPANY.

Middleton's dep., Rec., p. 213; fols., 17-19.

Boyntons Affi. and Exhibits. Rec., pp. 927-929.

boundary of which is about six hundred feet south of the northern terminus of its main tracks; and another at a place known in this record as Burnham, about a mile south of the yards above mentioned, but within the corporate limits of the city of Denver. In the last named yard, the principal shops of the Denver Company were located. It also had shops at Pueblo.

Burns' dep. Rec., p. 604, fol. 1,867.

The yards at Denver have capacity in a blockade, for 800 cars—for sixteen months the average number in the Pueblo yard was a fraction over 744.

Middleton's dep. Rec., pp. 513-215.

The altitude of the Denver railway at Denver is 5,197 feet above the sea level; at Colorado Springs 5,992 feet; at Palmer Lake, 22.85 miles north of Colorado Springs, 7,240 feet. The maximum grade between Denver and Colorado Springs is seventy-five feet to the mile, and eleven per cent. of the railway between Denver and Palmer Lake and thirty per cent. of that between Colorado Springs and Palmer Lake are on that grade. The distance from Denver to Colorado Springs is 75.10 miles; from Colorado Springs to Pueblo is 44.10 miles.

COLORADO COMPANY.

Rec., pp. 211, 212, 213; fols. 11-17.

See also *Smith's dep.* Rec. p.

The Chicago, Rock Island and Colorado Railway Company (hereafter referred to as the "Chicago Company," was incorporated under the laws of the State of Colorado on the 31st day of January, 1888, with power to construct, maintain and operate a railway, the main line of which should extend on the most feasible route from a connection, on the western boundary of the State of Kansas, with the Chicago, Kansas and Nebraska Railway, to Colorado Springs in said state; with branches from said main line, one to Denver, one to Pueblo, one to Denver from Colorado Springs, and one from Colorado Springs to Pueblo; with power to acquire by construction, lease, purchase or otherwise, railways extending to other points within or without the State of Colorado.

Chisholm's Exhibit. No. 1. Rec., p. 273; fols 268, 269.

Stipulation. Rec., p. 1,237.

A contract was conditionally executed by the officers of the two companies, on the 8th of March, 1888, under date of the preceding 15th of February. It was so executed in the exercise of authority conferred by the boards of directors of the contracting parties, but did not become

obligatory until confirmed by the stockholders of both companies. It was not so confirmed until the 29th day of May in the same year.

Bill, Exhibit A, Rec., p. 12.

The provisions regarded by either party as material to the contentions in this case, are substantially as follows:

Preamble.

The preamble recites that, the Denver Company owns a railway with appurtenant property, a portion of the main line of which "extends from Denver through Colorado Springs to South Pueblo;" that the Chicago company "owns a railway which is being constructed from the western boundary of the State of Kansas, at which point it will connect with the Chicago, Kansas and Nebraska railway, to the city of Colorado Springs;" that the interests of "both parties and the public will be promoted by the establishment and operation of a through line between all points on the line of railway of the Denver Company between and including Denver and South Pueblo, and all points on the line of railway which will be operated by the Chicago Company, and on the system of railways of which the Chicago Company will form a part."

Art. I, Sec. 1, Rec., p. 12.

By article 1, section 1, the Denver company "lets the Chicago company into the full, equal, joint and perpetual possession and the use of all its tracks, buildings, stations, sidings and switches on and along its line of railway between and including Denver and South Pueblo, excluding its shops at Burnham, meaning and intending hereby to include in the description aforesaid all and every portion of its railway and appurtenant property between and at the points aforesaid, and all improvements and betterments thereof and additions thereto, which may be used by the parties as hereinafter provided."

Art. III, Sec. 1 par. 2, Rec. p. 12.

If additional terminal facilities are made by the Denver Company on the demised property at Denver and South Pueblo, the Chicago company may elect to use them by paying to the Denver Company two and one-half per centum annually of the cost thereof. If the Chicago Company "shall desire any siding, spur or other tracks, other than those above specified," connecting any track

CONTRACT.

described in article 1, section 1, of the contract "with its own tracks, or with the tracks of any other railway company, or to any industry, or shall desire any facilities or conveniences which do not now exist," it may require the construction of the same by the Denver Company. If they are constructed by said company, they shall be jointly used, the Chicago Company paying annually for such use two and one-half per centum upon the cost thereof. If the Denver Company neglects to make such construction, it may be made by the Chicago Company, which shall have the exclusive use thereof until the Denver Company elects to pay two and one-half per centum of the cost, when it shall have the right to enter into the joint use.

Art. II, Sec. 2, Cl. 1 and 2, Rec., pp. 14 and 15.

The Chicago Company undertakes to pay, in monthly installments, for such use of said property interest at the rate of five per centum per annum upon one-half of the value thereof, which it was agreed was $3,000,000, certain additions and improvements to be made and covered by such valuation. Also a like interest upon such moneys as shall be expended in the improving and bettering the property in accordance with the provisions of the contract, and one-half of all taxes and assessments lawfully levied and actually paid upon the property jointly used.

It provided that this rental shall be paid "from and "after the completion of" the railway of the Chicago company "from the boundary line of the State of Kan- "sas to a connection with the railroad of the Denver "company at or near Colorado Springs;" and, further, that the interest upon the cost of betterments and improvements shall be paid only upon the cost of those made "after the Chicago company notifies the Denver "company of its acceptance" of the contract. It was again provided that, "no compensation will accrue or be paid to the Denver company, from or by the Chicago company, for the use and occupation of said premises before the railway of the Chicago company shall be com-

Art. II, Sec. 2, Cl. 10, Rec., p. 16.

pleted from its initial point in the western boundary of the State of Kansas to a completion of the railway of the Denver company within the time hereinafter specified."

These rentals may be reduced by the application of rentals which the Denver company may receive from other railway companies which it may let into the use of the same property or any part thereof, and by compensation to be paid by the Denver company for the use of facilities constructed at the sole expense of the Chicago company.

This demise is subject, however, to certain limitations and restrictions, some of which apply to the *description* of the property demised and some to the *use* thereof, and others to the *term*.

I. Limitations applicable to the description.

1. "The shops at Burnham" are excepted from the "description" by its terms. *Art. I, Sec. 1, Rec., p. 12.*

2. All improvements, betterments and additions which shall be made to or on the property at and between Denver and Pueblo, under the subsequent provisions of the contract, at the expense of one party, the other not electing to use the same, and the round houses at Denver and Pueblo were also excepted from this "description."

(1.) Additions, improvements or betterments of the property which shall cost more than $5,000 and all additions to terminals at Denver, South Pueblo and Colorado Springs shall be made at the sole expense of the Denver Company, unless the Chicago Company shall, in the first instance, consent to the making of the same, or shall after they are constructed elect to use them under the contract, and pay interest on half the cost thereof, in addition to the rental above mentioned. *Art. III, Secs. 1 and 5, Rec., pp. 17 and 20*

Until such consent or election is made the additions and improvements so made are excepted from the description, and the Chicago Company has no right to use them: after the election is made "the improvements and better-

CONTRACT.

ments and additions" become a part of the property "jointly used by the parties as hereinafter provided."

Art. I, Sec. 2, Rec., p. 13.

(2.) The "housing" of locomotives which the Chicago Company "may have from time to time at Denver and South Pueblo," and the construction of round houses at those places for the exclusive use and control of the Chicago Company, are provided for by additional covenants which raise a necessary implication that these structures at those places were not included in the "description" set out in Article 1, section 1.

II. Limitations upon the "full, equal, joint and perpetual possession and use."

Art. III, Sec. 2, Rec., p. 18.

1. All rules and regulations "shall be executed and all trains shall be moved under the immediate direction of the superintendent or other officer duly authorized of the Denver Company."

Art. III, Sec. 4, Rec, p. 19.

2. The Chicago Company is not permitted to do any business as a common carrier of persons or property, between intermediate stations between Denver and Colorado Springs; or between intermediate stations between Colorado Springs and Denver; but it may carry "between stations on its railway and connecting lines and all points between and including Denver and South Pueblo. Provided, however, that if the Chicago Company shall at any time acquire by purchase, construction or otherwise, a railway not extending less than fifty miles from Pueblo, it shall have the right to transport persons and property between any point on such line and Denver."

Art. III, Sec. 4 par. 2, Rec., p. 19.

3. The Chicago Company will not permit any express company to do business on its trains to or from stations on the line of the Denver Company between South Pueblo and Colorado Springs, or between stations between Colorado Springs and Denver.

Art. III, Sec. 5, par. 1, Rec., p. 20.

4. The rates which shall be charged "by the Chicago Company between stations on the line of the Denver Company shall not be lower than than those charged at the same time for like transportation between the same

points by the Denver Company. Provided that, where the rates of the Denver Company are higher than those charged by competing lines, the Chicago Company is permitted to charge rates as low as those of the competing lines." CONTRACT.

5. The Denver Company may admit any other company into the use of the property, or any part thereof, upon substantially the same terms as those set out in the contract. *Art. III, Sec. 9, par., 4,* Rec., p. 23.

III. Limitations upon the term, which is for nine hundred and ninety-nine years.

1. If the Chicago Company shall fail to pay the rental reserved as the same shall become due, and such default shall continue for six calendar months after it has been admitted or adjudged, the contract may, at the option of the Denver Company, be declared void and inoperative. *Art. III, Sec. 12,* Rec. p. 23.

2. The contract is subordinate to the mortgages of the Denver Company's property and franchises, including those then existing and thereafter to be executed, and to the bonds issued and thereafter to be issued thereunder. *Art. III, Sec. 9, par 2,* Rec., p. 22.

The section which makes the foregoing provision provides further:

"It is understood that this agreement is subordinate to the existing mortgages of the Denver Company's property and franchises, and to the bonds issued and to be issued thereunder. It is also agreed that the Denver company may hereafter issue a further mortgage which shall also have priority over this contract upon its entire system, securing an issue of bonds not exceeding $5,000 per mile for the sole purpose of improving, bettering and equipping the property now owned and hereafter to be legally constructed and acquired by it, with the proceeds of the bonds secured by its mortgage dated July 15th, 1886." *Art. III. Sec. 9,* Rec., p.

The Denver company insists that the "full," equal and joint use and possession," and not the description, set out in article 1, section 1, is further limited by:

1. The recitals contained in the preamble and above stated. Rec. p. 12.

CONTRACT.

2. The covenant as to the housing of engines at Denver and South Pueblo.

Art. I, Sec. 3, Rec., p. 13.

3. The covenant of the Denver Company that, it "will maintain and keep in good repair" the property covered by the demise; and of the Chicago Company that it will pay a "proportion of the costs and expenses actually incurred and paid" for keeping the railway and appurtenant property, "in repair," as the number of wheels per mile, run by it, the Chicago Company, over said railway or any part thereof, bears to the whole number of wheels per mile over the same during the same period."

Art. I, Sec. 2, and Art. III, Sec. 2, cl. 4, Rec., pp. 12 and 14.

Art. III, Sec. 2, cl. b, Rec., p. 15.

4. The covenant of the Chicago company, to pay a like proportional share of the expenses actually incurred in paying proper salaries to the general superintendent and subordinate employes, including switchmen, telegraph operators, train dispatchers and others necessarily employed in the performance of the duties incident to the joint use and occupation of said railway, not including train men.

Art. I, Sec. 3, Rec., p. 13.

5. The covenant of the Denver company, that it will house and care for the engines of the Chicago company at Denver and Pueblo.

6. The limitation of the covenant of the Denver company to furnish coal and water to the engines and trains operated over "the railway of the Denver Company."

Art. II, Sec. 5, Rec., p. 16.

7. The covenant of the Chicago Company with the Denver Company, that it has power to and will construct its railway from the western boundary of the state of Kansas to Colorado Springs.

Art. II, Sec. 2, Rec., p. 14.

8. The provision that, the rental shall commence to run from the completion of the railway of the Chicago Company to a "connection with the railway of the Denver Company at or near Colorado Springs."

Art. III, Sec. 10, Rec., p. 23.

9. The provision, that the Chicago company should on or before the 1st day of April, 1888, "notify the Denver Company whether or not it elects to build its line afore-

said from said point on the western boundary line of the State of Kansas to said Colorado Springs"; that if it elects to build said line, it agrees to complete the same and to "occupy" the line of the Denver company, and to be bound by the terms of this contract, on or before the 31st day of December, 1889, and "that if it shall elect not to build said line, this contract shall, on the 1st day of April, 1888, become void and of no effect."

10. The provision, that if the Chicago Company "hauls through freight destined to points beyond Denver or South Pueblo to said points, instead of delivering it to the Denver company at Colorado Springs, it will receive no larger division of the through rate because of such additional haul." *Art. III, Sec. 4, par. 4,* Rec., p. 20.

11. The covenant of the parties that "the contract shall attach to and run with the railways of the respective parties during the corporate existence of each, and of all extensions of such existence by renewal or otherwise; and that it shall be binding upon the lessees, assigns, grantees and successors of each during the continuance of their several corporate existence." *Art. III, Sec. 9,* Rec., p. 22.

The contract contains other provisions which illustrate the rights and relations of the parties, as the requirements that schedules of rates and rules and regulations for the operation of the railway "shall be made from time to "time by officers duly authorized by the parties," and "shall be reasonable and just to both parties," securing to neither "any unfair preference against the other"; that any employe of one company engaged in the operation of any part of the railway jointly occupied and used under the contract shall be removed from the portion of said railway so operated upon the request of the other; that each shall indemnify the other for any damage which the other may sustain because of its failure to observe any police regulation; that each shall be liable to the other for the results of the misconduct or carelessness of its own employes; that other companies admitted to the use of the property shall be admitted upon substantially the terms granted to the Chicago Company, and the

Art. III, Sec. 2, Rec., p. 18.

Art. III, Sec. 2, Rec., p. 18.

Art. III, Sec. 8, Rec., p. 19.

Art. III, Sec. 6, Rec., p. 21.

Art. III, Sec. 8, Rec., p. 21.

Art. III, Sec. 9, Rec., p. 23.

CONTRACT.

rental paid by such new companies shall be divided between the Denver and the Chicago Company; that "either "party may exchange business with other companies in "car-load lots or otherwise"; that neither company shall have "the right to haul the passenger trains of any other "railway company over said line of railway without the "consent of the other party," except in a particular case mentioned, and that "any matter of difference which "may arise between the parties having reference to this "agreement, either as to its construction or any alleged "violation of its provisions, or refusal to perform any "duties which it may be claimed that it imposes, or as to "any amount claimed to be due from one party to the "other, and which cannot be amicably adjusted, may be, "on demand of either party, submitted to three disinter-"ested persons experienced in railway operation as arbi-"trators," chosen in manner and form as provided by the agreement.

Art. III, Sec. 11. Rec., p. 23.

Art. III, Sec. 12. Rec., p. 24.

The Denver Company covenants that "it will, if re-"quired by the Chicago Company, provide the neces-"sary housing and care of the locomotives which the said "party may have from time to time at Denver and South "Pueblo, upon reasonable terms." Also, that "it will, "upon like requisition, furnish in the same manner it "provides its own locomotives, on its tracks above de-"scribed, all water and coal which the Chicago Com-"pany will need for the operation of its trains over the "railway of the Denver Company."

Art. I, Sec. 3. Rec., p. 15.

Art. III, Sec. 9. Rec., p. 22.

It is also provided "that the Chicago Company can "assign its interest in this contract only by sale, lease or "consolidation of its own property."

Chisholm's Exhibit No. 1. Rec., p. 263, fols. 207-220.

When the contract was settled in February, 1888, the date named in article III, section 10, upon which the Chicago Company was required to give notice of its election to definitely accept this contract, was "May 1st," instead of "April 1st." Section 9 of the same article was incorporated in the contract when it was finally revised in March of that year, and the change in date was then made.

Rec., p. 273, fols. 268, 269.

CONSOLIDATION.

This contract was ratified and approved by the stockholders of the Denver Company on the 22d day of May, 1888, and by the stockholders of the Chicago Company on the 29th day of the same month. On the last named date the stockholders of the Chicago Company approved articles of consolidation to be entered into with the Kansas Company, by the terms of which all of the rights of the constituent companies were conveyed to the consolidated company, and the lease, which then existed, the Kansas Company to the St. Joseph Company, bearing date the 15th day of May, 1886, was extended over the entire property of the consolidated corporation. These articles were formally executed as of the 13th of the following June. It is admitted that this consolidation was operative to transfer to the consolidated company the rights of the Chicago Company under the contract. The consolidated company constructed a railway from the western boundary of the state of Kansas to Colorado Springs, and commenced to operate it, in connection with the railway of the Denver Company between Denver and Pueblo, about November 5th, 1888.

Ratification.
Stipulation.
Rec., p. 1,237.
Chisholms Exhibit No. 1.
Rec., pp. 274, 275.
Articles of Consolidation.
Rec., pp. 181-188.
Amended Answer, Div. XI.
Rec., pp. 121, 122.

DEED.

On the 29th day of December, in that year, the St. Joseph Company by deed duly executed, conveyed to the Rock Island Company all of its property by terms sufficiently comprehensive to carry its rights under the contract. On the 31st day of the same month the Kansas and St. Joseph companies united in the execution of a deed of assignment, by the express terms of which they conveyed to the Rock Island Company their interests and rights in all leases including this contract. The Rock Island Company entered into the possession and use of the property on the 1st of January, 1889, and has so continued until the present day.

Rec., pp. 188-192.

ASSIGNMENT OF LEASES.

OPERATION OF YARDS.

Prior to the 16th of February, 1889, some correspondence had occurred between Mr. Cable and Mr. Smith in regard to the movement of Rock Island engines and cars on the railway of the Denver Company. On that day Mr. Smith addressed Mr. Cable a letter in which he

OPERATION OF YARD.

states the Denver Company's construction of some of the provisions of the contract:

Rec., pp. 193-197. *Smith's Exhibit No. 7.* Rec., p. 872; fols. 2,571-2,574.

"Referring to the differences of opinion which have "arisen concerning the respective rights of the C., K. & N. "R. R. Company, under the agreement of February 15, "1888, the following queries have been submitted, and "after conferring with our general counsel have been "answered as follows:

* * * * *

Letter, Feb. 16, 188..

"Q. 2. Under the contract are the C., K. & N. switch "engines allowed to do work in the Colorado Springs "yard, and should all switching, including transfer to Mid- "land be done by the D. and R. G. switch engines; and "does the Colorado Springs yards stand upon any other "basis than those at Pueblo and Denver?

"A. The C., K. and N. Company has the right, if it "desires to do so, to do work in the Colorado Springs "yards with its switch engines, and to do all the neces- "sary switching for that company with its own engines: "but this can only be done under the direction and "instructions of the superintendent or other designated "officers of the D. and R. G. R. R. Co. The same rule "applies in this as stated in query one, that all movement of "engines, trains and cars must be under the sole direc- "tion of the superintendent or designated officer of the "D. and R. G. R. R. Co. There can be no divided authority "in regard to the movement of engines, trains and cars. "In this respect the yards at Pueblo, Colorado Springs "and Denver are subject to the same principle."

In his reply to this letter, under dated of February 22d, Mr. Cable said:

Smith's Exhibit No. 8. Rec., p. 874; fol. 2,580.

"We have acted on the theory that the movement of trains on your tracks must be under the direction of your operating officers: that operations in the yards must conform to reasonable yard rules, and that in all other re- spects we have exclusive control of our engines and cars."

On the 26th of the month, Mr. Smith said in reply:

—Exhibit No. 9. Rec., p. 874; fol. 2,582.

"This company is at all times ready and willing to unite with you in making and modifying rules and regu- lations for the movement of engines and trains in such a way as to accord equality of right, privilege and advant- age as far as practicable. But in the *execution* of these rules and regulations there can be no divided authority."

TRAFFIC OVER UNION PACIFIC.

On the 10th day of April, 1889, the Union Pacific and the Rock Island Companies entered into a contract, by the terms of which the first named granted to the last named

TRAFFIC OVER UNION PACIFIC.
TRACKAGE ON ARRANGEMENT.

Union Pacific and Rock Island Companies. Rec., pp. 198-205.

the right to connect its railway with that of the Union Pacific at Limon, the point at which the railways crossed, about ninety miles easterly from Denver; and to operate its freight and passenger trains over the tracks of said Union Pacific Company between Limon and Denver.

The line created by the execution of this contract between Denver and all points on the railway of the complainant company east of Limon, was sixty-four miles shorter than that by way of Colorado Springs and was over a railroad the maximum grade of which was sixty feet in the mile.

On the 5th day of May, 1889, the Rock Island Company commenced the operation of trains direct to Denver from Limon over the track of the Union Pacific. Some of its Denver traffic was carried by way of Colorado Springs, but the greater portion direct; and all was handled in the joint yard at Denver.

Smith's Exhibit No. 1. Rec., p. 870, fol. 2,566.

On the 10th of May, in said year, Mr. Smith telegraphed to Mr. Cable:

"I have just seen Mr. Allen, general superintendent, and have notified him that although we are not required by our contract to handle or care for your trains and equipment brought to Denver over the Union Pacific line, we do so temporarily, with the understanding that the compensation for such service, as also for the use of our tracks by such trains will be made at an early date."

To this Mr. Cable replied on the day following:

—Exhibit No. 2. Rec., p. 870, fol. 2,567.

"Of course, any service performed for us not covered by contract, will be paid for by our company. When I come out in June I will spend time enough with you to take up all matters between us that may require attention; have no doubt that everything can be satisfactorily arranged."

OPERATION OF YARDS.

St. John's dep., Rec., p. 1,127, fols. 672-674, Rec., p. 1,127, fols. 675-676.

Two interviews occurred on the 25th of April, 1890, between General Manager Smith, of the Denver Company, and General Manager St. John, of the Rock Island. The first one was in the morning, and Mr. Verbryck, the master car-builder, and Mr. Wilson, the master mechanic, of the Rock Island, were present. Mr. St. John expressed the desire of the Rock Island to use its own employes in

OPERATION OF YARDS.

cleaning its cars. Mr. Smith disposed of the matter for the time being by referring him to Mr. Sample, superintendent of machinery for the Denver Company. Another interview occurred about 2 o'clock P. M. of the same day when Wilson and Verbryck were present.

It is sufficient to say in this connection, that the matter discussed between the parties present, was the cleaning at Denver of the passenger coaches used by the Rock Island Company, in operating the line between Denver and Pueblo. The details of their several conversations will be presented in another part of this abstract.

Smith's dep. Rec., p. 762, fol. 2452 et seq.

On the 3d of May following, Mr. Cable addressed a letter to Mr. Smith in which he referred to the interview above set out, and added:

Smith's Exhibit No. 15, Rec., p. 877, fol. 2,590.

"Will you be kind enough to repeat, in reply to this note, the substance of what you said to Mr. Verbryck in regard to this matter? If you propose to exclude our employes, as Mr. Verbryck reports, I prefer that it shall be done in a manner that shall leave no room for any controversy as to the language used; and to avoid the possibility of any such question, I now add to the foregoing request that you will state explicitly whether or not you propose to refuse to allow our employes to clean our cars standing upon your tracks at or near Denver."

On the same day he addressed another note to Mr. Smith, in which he advised him:

—Exhibit No. 17. Rec., p. 878.

"I have instructed our general superintendent, Mr. Allen, to take up with your superintendent the matter of switching and handling freight at Denver, with a view to having it done by our own employes more economically and satisfactorily. This is to request that you will instruct your superintendent to join Mr. Allen in making proper rules and regulations with a view to having the work done in the manner suggested."

—Exhibit No. 18.

Rec., pp. 878, 879, fols. 2,596-2598.

To the last mentioned note Mr. Smith sent an answer, under date of May 6th, declining to "give any instruc-"tions for the making of any rules and regulations with "a view to having your freights at Denver switched or "handled by your employes," and for this he assigns reasons:

"*First.* Because of the impracticability of having two

sets of men under different supervision working in the same yards and warehouses; and

OPERATION OF YARDS.

"*Second.* Because as to the freights and traffic you are bringing to and from Denver by way of the Union Pacific, you have no right whatever to the use of our terminal facilities here. Such use upon your part is confined to such freights and traffic as you carry over our line under the lease of February 15, 1888."

He said further:

"I further beg to call your attention to the fact that the matter of compensation to us for the use of our terminal facilities and services rendered for you and supplies furnished in connection with your traffic by way of the Union Pacific is unsettled."

TRAFFIC BY UNION PACIFIC. SHOPS AT BURNHAM.

In his answer to the note of Mr. Cable first above mentioned, he states the following objections to arrangement for the cleaning of Rock Island cars by Rock Island employes:

Smith's Exhibit No. 16, Rec., pp. 877-878; fols. 2,592-2,594.

"*First.* That the coach track upon which these cars have heretofore been cleaned is a part of Burnham shops and is in no manner included in the lease of February 15, 1888.

"*Second.* That the cars you are running to and from Denver by way of the Union Pacific Railway in no event can come under the terms of the lease, and you have no right to pass them through or over any part of the leased property and have heretofore done so under a promise that you would arrange as to the compensation therefor."

He repeated the language above quoted from his answer to the other note written him on the same day by Mr. Cable.

On the 23d day of May, 1890, the Rock Island Company demanded, in manner and form as provided by the contract of February 15th, 1888, the decision by referees of the following questions:

OPERATION OF YARDS.

"What rules and regulations shall be established and observed by the parties to secure to each the full, equal and joint use and possession of the tracks, buildings, stations, sidings, switches and other property forming a part of the railroad and other appurtenant property of the Denver and Rio Grande Railroad Company at Denver, Colorado Springs and Pueblo: and what reports shall be made by each party, what shall be reported, to whom, and in what manner accounts shall be adjusted when such

Smith's Exhibit No. 63, Rec., pp. 398-399; fol. 760.

OPERATION OF YARDS.

adjustment is not provided for by the terms of the contract."

O *Vaile's Exhibit No. 65,* Rec., p. 401; fols. 769-771.

In the same notice it nominated C. F. Meek to be one of the referees.

On the 28th of May Mr. Smith replied:

TRAFFIC BY UNION PACIFIC.

"I do not consider that any differences on these questions have arisen.

"The questions of difference between us I understand to be the following:

"1. The right of the Rock Island Company to use the Denver terminals of the Rio Grande Company for the business done by the Rock Island over the tracks of the Union Pacific.

"You affirm that you have the right to do such business in the Denver yards, and to compensate the Rio
R Grande Company on a wheelage basis of traffic between Colorado Springs and Denver, over Rio Grande tracks. I maintain that the traffic at Denver, brought by you to Denver over the Union Pacific Railroad is outside of the contract, and that we must make some satisfactory agreement in reference thereto or the use of our yard at
S Denver must be discontinued.

YARD AT PUEBLO.

"2. You claim that there should be an arbitrary division of the expenses for Pueblo terminals, based upon the relative use by the two companies, after first excluding the Rio Grande's use for the divisions west and South of Pueblo.

"This position I dispute.

SHOPS AT BURNHAM.

"3. You claim the use of our coach track at Burnham as a part of the railway, while I maintain that it is a part of the shops at Burnham.

"4. You claim the right to use the 'Y' for turning your trains. I maintain it is a part of Burnham shops, and has been built since contract and is outside of same.

BETTERMENTS.

"5. The question of heavy rail and oak tie betterments on old main line are also the subjects of difference, as well as the double track from Cactus to Pueblo.

"Now, none of these questions of difference are included in the questions you suggest for arbitration."

He then proposed an arrangement to submit all of these
I and resultant questions.

The Denver Company permitted the time to pass within which it had the right under the contract to nominate the second referee. Upon being advised that the Rock Island Company was willing to waive the advant-

age secured to it by this default, it did, on the 18th day of June, name W. F. Merrill, as referee; protesting, however, that the questions stated for decision were indefinite and uncertain and not subject to decision by arbitration. SHOPS AT BURNHAM.

On the same day it addressed to the Rock Island Company a demand that the following questions be decided by reference: *Reference.*

1st. Under the proper construction of said contract, what grounds and tracks are included in the words "shops at Burnham"? Rec., p. 402.

2nd. Has the Chicago, Rock Island and Colorado Railway Company, The Chicago, Kansas and Nebraska Railroad Company, or The Chicago, Rock Island and Pacific Railway Company, or either of them, the right under said contract to use the "Wye" on Burnham shop grounds for the use of either of said companies; and if not, what compensation is this company entitled to receive from either of said companies for the use of said "Wye" and what amount is due to this company for such use up to the time of hearing?

3rd. Has the Chicago, Rock Island and Colorado Railway Company, The Chicago, Kansas and Nebraska Railroad Company, or the Chicago, Rock Island and Pacific Railway Company, or either of them, the right to use the coach track at Burnham shops under said contract, for the purpose of cleaning its coaches and cars thereon; and if not, what compensation is this company entitled to receive from either of said last named companies for such service as has heretofore been rendered in that respect, up to the time of hearing?

— and naming W. F. Merrill, Esq., as the referee nominated by it.

On the 30th day of June, 1890, Mr. Smith addressed to Mr. Cable, as President of the Chicago, Rock Island and Pacific Railway Company, a letter, in which, after a reference to the correspondence above mentioned, the following paragraph occurs: TRAFFIC BY THE UNION PACIFIC. *Notice to quit.*

"In consequence of the crowded condition of our yard in Denver and the premises above stated, the Denver and Rio Grande Railroad Company hereby notifies The Chicago, Rock Island and Pacific Railway Company to cease the use of the Denver terminals of the Rio Grande Company, or any part thereof, for the handling or care of any of the cars, trains or equipments, or traffic of the *Vaile's Exhibit No. 68.* Rec., p. 415, fol. 790.

TRAFFIC BY THE UNION PACIFIC.

Pleadings.

Rock Island Company to or from Denver, carried by it over the Union Pacific line; and that on and after the 5th day of August next, the Denver and Rio Grande Railroad Company will exclude the cars, trains and equipment and traffic of the Rock Island Company by way of the Union Pacific line from the yards of the Rio Grande Company in Denver."

Original bill.
Rec., pp. 1-27.

The original bill in this case was filed on the 22d of July, 1890, and on the same day, before answer, an amendment was filed. This bill and amendment were constructed solely with a view to relief against the threat of the Denver company to exclude its traffic by way of the Union Pacific from the yards at Denver, and the prayer asked for relief in that regard as above stated. The defendant filed an answer and cross-bill, and to the cross-bill the original complainant interposed an answer.

Amendment to bill.
Rec., pp. 27-31.

After the filing of the bill and before the hearing, the defendant concluded to withdraw from all references which had been agreed upon and so advised the plaintiff. While the motion for the injunction was being heard the plaintiff was advised that defendant might decide to proceed with the reference, in which case they would ask leave to amend their answer and cross-bill by eliminating all matters which would be covered by the reference.

REFERENCES.

The application for the injunction was not decided for for several days. While it was pending and on the 1st of August, Wolcott & Vaile telegraphed Mr. Low:

Vaile's dep.
Rec., p. 334, fols. 513, 515.

"We suggest that you come up here at once, and that you formulate such rules and regulations as you desire adopted. Such of them as our management find just and proper we will accede to. Such of them as we disapprove of to be arbitrated. We to formulate such rules and regulations as we want adopted, to be submitted to you for your approval, and such as are not approved of, to be arbitrated; parties to submit any other specific question arising out of the contract other than Union Pacific traffic."

Vaile's Exhibit No. 70a.
Rec., p. 417, fol. 796.

No. 70 b.
Rec., p. 407, fol. 787.

In accordance with this suggestion, after Mr. Justice MILLER ordered the writ as prayed, an arrangement was made for a meeting of the representatives of the two companies, at Denver. At the meeting, the plaintiff was

represented by Mr. Low of its law department, and Mr. Allen, general superintendent of its line west of the Missouri river; and the defendant by Mr. Easley, of its law department, and Mr. Deuel, superintendent of the division which embraced the railway jointly used between Denver and Pueblo. Mr. Vaile states the result of the interview as follows:

REFERENCE.

OPERATION OF YARDS.

"As I understand, almost the first question that arose was as to to the right of the complainant company to put into the Denver yards of the defendant company separate switch engines, the exclusive property and for the exclusive use of the complainant company, and to be manned by employes who should be devoted to the exclusive services of the complainant company. This was, as the representatives of the Rio Grande Company considered it, so vital a question, and, as we thought, so palpably beyond anything that could be claimed under the contract, that, as I understand the situation, the negotiations closed by reason of the absolute inability of the parties to agree upon the admission of such separate engines and separate employes."

Vaile's dep., Rec., p. 336, fols. 523 and 524.

REFERENCE.

A meeting of the referees selected as provided by the contract was suggested for some date between the 25th of August and the 4th of September. On the 22d of August, Mr. Wolcott transmitted to Mr. Cable and to the referees selected a notice that The Denver Company "withdraws its concurrence and acceptance" of the selection of the referees, and "such and all of the references in the so-called matters of difference that may in any manner whatever heretofore have been submitted to the said" referees; and "cancels and revokes all power and authority" on the part of said referees, or of either of them to proceed with said arbitration or any part thereof."

Vaile's Exhibit, Nos. 69 and 70. Rec., p. 401, fols. 292-295.

Vaile's dep. Rec., p. 341, fols. 542-544.

OPERATION OF YARDS.

Pleadings.

On the first day of October, 1890, the Rock Island Company filed its second amendment to its original bill, and a supplemental bill. By the first it enlarged its prayer for relief by praying the court to so extend its writ of injunction as to—

Second Amendment to bill. Rec., p. 102.

—"restrain defendant from interfering with or hindering or obstructing the complainant in the use of its yards, buildings and other appurtenant property at Denver, Colorado Springs and Pueblo, including South Pueblo, and at other

OPERATION OF YARDS.

points between Denver and South Pueblo, by operating therein its, the complainants', engines, cars and trains by its own employes, by handling its own freight and caring for its own equipment by its own agents, by doing any other act or thing having reference to its own equipment, business and traffic, which the defendant may lawfully do therein with regard to its own equipment, business or traffic; and that it will from time to time make such additional orders and directions as shall be deemed necessary to secure to each of the parties the undisturbed and unobstructed use of all rights and privileges to which it is entitled by or subject to the contract of February 15th, A. D. 1888."

Supplemental Bill. Rec., p. 100.

The supplemental bill set out the several matters which occurred after the filing of the original bill, and prayed, "that on the final hearing the court will adjust and decree as prayed in the original bill and in the amendments thereto, and grant such other, further and different relief as to the court and equity shall seem meet."

Amended Answer, Div. IX. Rec., p. 120.

On the 4th day of November, the defendant filed an amended answer to the original bill and amendments. On the same day it filed an answer to the supplemental bill and amendments to the cross-bill. On the 5th of November, the Rock Island Company filed an answer to the cross-bill. Replications to all of the answers were filed by the complainant in the original and in the cross-bill.

Subsequently the cross-bill and answers thereto were dismissed by stipulation, and all matters in the original bill, the amendments thereto and the supplemental bill, and in the answers thereto, relating to the accounts between the parties, were stricken therefrom, leaving the cause for hearing on the other issues joined.

After the hearing before the Honorable HENRY C. CALDWELL, Judge of the Circuit court of the United States for the Eighth Circuit, he delivered an opinion in writing which is in the record.

FINAL DECREE.

A final decree was signed and made of record at the same time, in which it was adjudged and decreed:

Rec., p. 1,259.

I. That the Rock Island Company is the successor in

interest of the Chicago Company, "and has the right to operate its trains over the line of the defendant company, described in said contract, with all the rights and subject to all the limitations in said contract granted or reserved to the said" Chicago Company.

Title of Rock Island.

Rec., p. 1,259.

II. That the Rock Island Company "is not, under said contract, entitled, nor has it any right to bring its engines, cars or trains over the tracks of the Union Pacific Railway Company into or upon the Denver Terminals of the defendant company; and that said complainant has no right, under said contract, in the tracks, switches, side-tracks or terminals of the said defendant, except for such business as it brings upon said tracks by the way of the city of Colorado Springs; that the rights granted under said contract by the defendant to the said The Chicago, Rock Island and Colorado Railway Company, run with and are appurtenant solely to the line of railway connecting with the defendant's line of railway at said city of Colorado Springs; and that the complainant is, under said contract, entitled to carry business to and from any portion of defendant's said line of railway, described in said contract, by the way of the said city of Colorado Springs, and not otherwise."

Traffic by Union Pacific.

Rec., p. 1,260.

III. That the Rock Island Company, "under and by virtue of said contract, is entitled to and has the right, at its option to employ its separate switching crews and operate its own switching engines in the railroad yards of the defendant company under the sole and absolute supervision, direction and control, however, of the yard-master or other properly constituted officer or agent of the defendant, and subject to the order and instruction of said yard-master, or other officer or agent so appointed by the said defendant; which orders and instructions shall be given and executed in good faith and without discrimination, and in accordance with the provisions of said contract:" and "that the complainant is also entitled and has the right at its option, to handle traffic with its separate employes, and to perform any other service which can be performed for it exclusively, including the handling of

Operation of Yards.

Rec., p. 1,260.

FINAL DECREE.

traffic received from or delivered to other railroads by the complainant, to the same extent and as fully in all respects as the defendant may perform like services for itself, and have like use of the joint property for that purpose."

Shops at Burnham.

IV. "That the words 'shops at Burnham,' used in section 1 of Article 1, of said contract of February 15, 1888, includes all lands used or procured for shop purposes and appurtenant to the shops located at Burnham, on the west side of defendant's main line of railway, bounded on the north by the north line of the parcel of land known as the 'Burlingame tract,' and on the south by the north line of the parcel of land known as the Bailey tract (being the north line of Vasquez street), containing sixty acres, more or less, together with all buidings, tracks and other improvements and appurtenances therein situated; and that the complainant has no interest in or right to the use of any portion of the said premises hereinbefore described"; but "the complainant shall not be excluded from the use of the Wye track at Burnham for the turning of its engines, cars and trains so long as it shall continue to pay for the use thereof, interest at the rate of two and one-half per centum per annum on the cost of its construction, unless and until the defendant shall provide at Denver another Wye track for the turning of such engines, cars and trains."

Rec., p. 1,260.

Wye track.

Coach tracks.

V. "That the parties shall set apart a track at Denver on which the complainant shall have the right to clean its cars, and if no existing track can be conveniently devoted to that purpose, the defendant shall construct and equip a tract therefor, at the joint expense of the parties, plaintiff and defendant."

Rec., p. 1,260.

Costs.

VI. "Each party shall pay one-half the costs."

Rec., p. 1,260.

The Rock Island Company appeals from so much of the decree as is set out in the paragraphs numbered II, III, IV and VI, and the defendant from the portions set out in the paragraphs numbered I, III, V and VI and that part of paragraph IV relating to the use of the Wye at Burnham. All conditions imposed on the allowance of these appeals have been performed, and it is stipulated that they shall be heard together in this court.

Rec., p. 1,262.

The contentions which have arisen betweeen the parties concern the contract, the provisions of which are concisely stated in the preceding pages. The allegation of the pleadings and the testimony taken as to each of

them will be more particularly stated in the following pages.

FIRST.

AS TO THE RIGHTS OF THE ROCK ISLAND COMPANY, AS ASSIGNEE OF THE CHICAGO COMPANY, UNDER THE CONTRACT OF FEBRUARY 15, 1888.

1. The paper title of the Rock Island Company.

Documentary evidence.

Reference has been made in the preceding pages to the documentary evidence which constitutes complainant's paper title. The defendant admits by its pleadings, that the "consolidated corporation * * * succeeded to and became vested with all of the property and property rights, and all of the corporate rights, powers, franchises and privileges of said two constituent companies, including the contract between the said Chicago, Rock Island and Colorado Railway Company and defendant, hereinbefore mentioned (the contract of February 15, 1888), and thereupon entered into the enjoyment and possession of the same." Coupled with this admission, however, are the allegations:

Amended answer, Div. XI, Rec., p. 22.

1. That the Kansas Company was not by its charter authorized to construct, acquire or operate any line of railway anywhere else than in the States of Kansas and Nebraska, and that for that reason the lease of May 15, 1886, did not cover any railway in the State of Colorado.

—Rec., p. 122.

2. That the consolidated company had never at any time, "by sale, loan or consolidation of its own property "transferred or assigned its interest in said contract" of February 15, 1888, "to the complainant or to any other "party."

—Rec., p. 122.

3. That if a deed was executed by the St. Joseph Company to the Rock Island Company, on the 29th of December, 1888, as alleged in the bill, it was ineffectual to transfer said contract, for the reason that "the said St. "Joseph and Iowa Railroad Company had no right, title "or interest in or to" the railway constructed by the Chicago Company in the State of Colorado, or in or to the contract of February 15, 1888.

Div. XI and XII, Rec. bottom p 122 and 2d par. p. 123.

ROCK ISLAND'S TITLE.

II. The facts which it is claimed conclude the defendant.

History of contract.

The following statement presents undisputed facts and testimony as to the controverted allegations, which were regarded by one or the other of the parties as material to the contention of the plaintiff, that under the circumstances established, the defendant will not be permitted to dispute plaintiff's right.

Cable's aff., Rec., pp. 887, 888, fols. 1-8.

In the fall of 1887, the Rock Island resolved to extend its system into the State of Colorado from the point at which the railroad of the Kansas Company would intersect the eastern boundery of that state. R. R. Cable, the president of the Rock Island Company, visited Colorado with a view to considering and determining the best plan for such extension. He had an interview with D. H. Moffat, President of the Denver Company, at Denver, in which it was suggested that it would probably be necessary to organize a company in and under the laws of the State of Colorado for the construction of that portion of the extension which would be in that state, and that a contract should be entered into between the new company and the Denver Company for the joint use of the property of the last named corporation between and at Denver and at Pueblo.

—Rec., p. 899, fols. 8-10.

In that conversation the president of the Denver company requested that Hon. Edward O. Wolcott, then and now general counsel for that company, be professionally employed in carrying the plan into execution. Mr. Cable complied with this request.

It was further agreed between the presidents that Mr. Wolcott should prepare a draft of the proposed contract; that Mr. Cable should cause another to be prepared by Thomas F. Withrow, then the general solicitor of the Rock Island Company: that a meeting should thereafter be had between Mr. Wolcott and Mr. Withrow for a definite settlement of the terms of the contract, and for the further consideration of the plan for the organization of the Colorado company.

Mr. Cable's affidavit was filed in this cause on the 6th of November, 1890. On the day following Mr. Moffat made a counter affidavit, in which he refers to the conversation mentioned above, but does not in any manner challenge the correctness of the statements made as to the employment of Mr. Wolcott.

Cable's Affi. Rec., p. 907; fol. 97.

Mr. Joel F. Vaile, then an employe, now the partner of Mr. Wolcott, gave his personal attention to much of the business which was brought into Mr. Wolcott's office by the arrangement made with Mr. Cable in compliance with the suggestion of Mr. Moffat. Mr. Vaile was examined as a witness touching the knowledge in Mr. Wolcott's office as to the relations of the Rock Island Company to the new enterprise. His answers were:

Moffat's Affi., Rec., p. 933; fol. 193, *et seq.*

"I understood that persons interested in The Chicago, Rock Island and Pacific Railway Company were the promoters of the Chicago, Rock Island and Colorado Railway Company; that is as far as my knowledge extended"; the promoters "so far as they were known to me were Mr. Cable and Mr. Low—I considered Mr. Withrow was also one of them;" "we never, so far as I know, did any work for The Chicago, Rock Island and Pacific Railway Company, or were ever retained by that company for any legal service. We were retained by the Chicago, Rock Island and Colorado Railway Company as we understood, and later by the Chicago, Kansas and Nebraska Railway Company, as the successor by consolidation of the Chicago, Rock Island and Colorado Railway Company."

Vaile's dep. Rec., p. 299; fol. 370.

Rec., p. 302; fol. 833.

Rec., p. 321, fol. 458.

See also, cross-ex. of Vaile by Wolcott, Rec., p. 346.

Mr. Wolcott in an affidavit made after Mr. Cable's was filed, says: "that Mr. Cable asked affiant if there was any reason why affiant could not act for the company which he (Mr. Cable) represented and proposed to organize;" and that "any legal employment which he subsequently undertook for said Cable, or any of the companies he represented, was undertaken and entered into with the distinct understanding that his duties should not interfere with his duties to the Denver Company."

ROCK ISLAND TITLE.

On the 7th of December, 1887, Mr. Cable inclosed to S. T. Smith, general manager of the Rio Grande Company, "a draft contract as prepared by our solicitor for "use of your track between Denver and Pueblo." On the day following it was arranged by telegraphic correspondence between Mr. Cable and Mr. Wolcott that a meeting between Mr. Wolcott and Mr. Withrow, for the consideration of the proposed contract, should occur at Chicago on the 17th of the same month. About the 17th of December, the meeting between Mr. Wolcott and Mr. Withrow occurred in the city of Chicago. The conference, at which the contract was settled and the provisions of the articles of the new company in Colorado were agreed upon, extended through the greater portion of two days—Saturday, the 17th, and Monday, the 19th.

Vaile's dep., Exhibit No. 1. Rec., p. 378; fol. 692, *Exhibit No. 2.* —Rec., p. 378, fol. 693; *Exhibit No. 3.* —Rec., p. 387, fol. 721.

Cable's dep., Rec., p. 899; fols. 13, 14.

In the discussion as to the articles of incorporation Mr. Wolcott urged the adoption of a name which would advise the people of Colorado that the new company was being organized for the purpose of carrying into execution the proposed extension of the Rock Island railway into that state; and he proposed as a suggestive name, "The Chicago, Rock Island and Colorado Railway Company," which proposition was accepted. He was on his way to New York, and it was arranged that clean copies of the draft of contract should be made, some of which should be delivered to him and some retained by Mr. Withrow; that Mr. Cable, Mr. Wolcott and Mr. Withrow should meet in New York within a few days for a further consideration of the draft of contract, after Mr. Wolcott had had an opportunity to confer with the officers of the Denver Company, in that city; and that Mr. Withrow should make a draft of the Articles of Incorporation of the Colorado Company, which should be revised by Mr. Wolcott, with a view to making them conform to the statutes of Colorado.

Chisholm's Exhibit No. 2. Rec., pp. 275, 276; fosl. 279, 280.

Chisholm's dep., Rec., p. 233; fol. 95.

Wolcott's Affi., Rec., p. 941, fol. 228.

A draft of the proposed articles of incorporation for the Chicago Company was prepared by Mr. Withrow and sent to Mr. Wolcott. It declared that "the object of this

corporation shall be 'to create or acquire, by construction, lease, purchase or otherwise, a railway with a telegraph and other appurtenant property which shall extend from the point on the western boundary of the State of Kansas, at which it can connect with the railway of the Chicago, Kansas and Nebraska Railway Company; * * * thence to Denver, Colorado Springs and Pueblo.'" It was further declared that it "may construct its railway from the initial terminus named on the western boundary of the State of Kansas to said city of Denver, Colorado Springs or Pueblo, or to all of said cities, * * * or to each or any one or more of said cities; and acquire the right to operate, exclusively or jointly with the owner, its trains over any railway which now exists, or may hereafter exist connecting said cities."

Cable's Aff't., Rec., p. 890, fol. 16.

The several parties met in New York early in January, pursuant to the arrangement which has been made in Chicago. At this interview there was a further revision of the draft of the contract. It was arranged that the revised draft should be submitted by Mr. Wolcott to the president and general manager of the Denver Company, on his return to Denver; that if satisfactory to them, it should be executed in the form in which it was then settled, after the completion of the organization of the Chicago Company. On the 24th of January, 1888, Mr. Wolcott advised Mr. Cable by telegraph that the "proposed contract" was satisfactory to the President and General Manager, with one reservation—they were unwilling to permit the lessee to operate passenger trains between Denver and Pueblo. Mention is also made of the fact that the valuation of the property was to be agreed upon. To this Mr. Cable answered that he thought the objections should not be insisted upon, but that he would take it up for discussion, when he should visit Colorado, which would be between the 4th and 10th of the following February. The court will observe that this left but two unsettled questions—the operation of

Vaile's Exhibit No. 33, Rec., p. 388, fol. 722.

—*No 4*. Rec., p. 379, fol. 694.

ROCK ISLAND'S TITLE.

passenger trains between Denver and Pueblo and the value of the property.

Vaile's Exhibit No. 4. Rec., p. 388, fol. 723.

On the 26th—two days later—Mr. Wolcott telegraphed to Mr. Withrow, as "General Counsel C., R. I. & P. R. R.," saying: "Articles of association prepared. Do we enter Colorado in Arrapahoe or Elbert county? Am anxious to state definitely, if possible. Think it of some importance. Have changed articles somewhat, *but not materially*." To which Mr. Withrow replied on the 27th: "*We* enter Colorado in Elbert county." On the same day Mr. Wolcott telegraphed Mr. Withrow, addressing him as "General Solicitor C., R. I. & P. R. R.": "Articles all ready; shall I file?" To which Mr. Withrow replied on the 28th: "Yes." On the 30th of January Mr. Cable asked Mr. Wolcott if he could have the articles filed and arrange for a meeting of the board of directors in Chicago before he (Cable) should go west, to which Mr. Wolcott replied, on the same day, that the articles would be filed on the morrow, "meeting of incorporators held, and meeting of directors called for Friday, your office, Chicago." This telegram was addressed to Mr. Cable, as "President C., R. I. & P. R. R."

Exhibit No. 5. Rec., p. 379, fol. 695.

Exhibit No. 35. Rec., p. 388, fol. 724

Exhibit No 6. Rec., p. 379, fol. 695.

Exhibit No. 7. Rec., p. 379, fol. 695.

Articles of Incorporation, Chicago Company. Rec., pp. 177-178, fols. 70, 71.

The articles of incorporation revised by Mr. Wolcott were filed on the 31st day of January, 1888. They declared that the object of the company was "to create, acquire by construction, lease, purchase or otherwise, and to maintain and operate a line or lines of railway, with appurtenant property, which shall extend from the point on the eastern boundary of Elbert county and of the State of Colorado where it shall connect with the railway of the Chicago, Kansas and Nebraska Railway Company, 'a corporation organized and existing under the laws of the State of Kansas; thence in a southwesterly direction, by the most feasible route, to the city of Colorado Springs, in the county of El Paso, in the said State of Colorado, with a branch therefrom running in a northwesterly direction, by the most feasible route, to

Exhibit No. 36. Rec., p. 389, fol. 724.

the city of Denver, in the county of Arrapahoe, in said State of Colorado, with a further branch therefrom extending southwesterly to the city of Pueblo, in the county of Pueblo, in said State of Colorado; and with a branch therefrom extending from said city of Colorado Springs northerly to said city of Denver,' and with a branch therefrom extending southerly from said city of Colorado Springs to the said city of Pueblo; * * * to purchase, acquire, own, hold, manage and operate, by lease, consolidation or otherwise, other railroads situate within or without the State of Colorado, whenever and as thereunto duly authorized by law."

Mr. Vaile testifies that the articles as prepared by Mr. Withrow, and as revised by Mr. Wolcott into the form in which they were filed, were not materially different; that the difference was in the formal phraseology required by the statutes of Colorado, and "that the change was necessary to accomplish the design and intent of the person who drafted the original articles."

Vaile's dep., Rec., p. 344, fol. 555.

The corporators held their first meeting on the same day. Those present were Joel F. Vaile, one of the learned counsel for the Denver Company in this cause, then and now the representative of Mr. Wolcott, as its General Counsel when the latter was or is absent. The other incorporators with one exception, were employes in the office of Mr. Wolcott; and the one excepted was the private secretary of Mr. Wolcott's brother, whose office was in the same building. The board of directors named in the articles of incorporation were R. R. Cable, H. H. Porter, Marshall Field, R. P. Flower and Henry R. Wolcott—all, except Wolcott, directors of the Rock Island Company. The first act of the incorporators was to authorize these directors to meet at the office of the Rock Island Company in Chicago, and to direct that the first meeting of the board be held at that place on Friday, the 3d day of February. The directors named attended at the time and place, and organized by electing R. R. Cable, the President of the Rock Island Company, its President;

Chisholm's dep. Rec., pp. 225–227, fols. 64–73.

Parmalee's dep. Rec., pp. 279, 280, fols. 284–289.

Jolly's dep., Rec., pp. 281, 282, fols. 300–306.

Articles of incorporation, Art. V. Rec., p. 179, fol. 78.

Chisholm's Exhibit No 1, Rec., p. 252, fol. 166.

—Rec., p. 253, fol. 169.

Chisholm's dep. Rec., pp. 228, 229, fols. 74 and 78.

ROCK ISLAND TITLE.

W. G. Purdy, the secretary and treasurer of the Rock Island Company, its secretary and treasurer, and Colin A. Chisholm, Private Secretary of Edward O. Wolcott, its assistant secretary.

Chisholm's Exhibit, No. 1, Rec., p. 253, fols. 169, 170.

To this meeting the president made a report, stating that "informal negotiations had been had with the Denver and Rio Grande Railroad Company with a view to contracting for joint use of the railway of that company between Denver and South Pueblo by it and the Chicago, Rock Island and Colorado Railway Company." He submitted a draft of the contract with a statement that it "was satisfactory to the Denver and Rio Grande Railroad Company with the exception of the provision that allows this company to run passenger trains between Denver and South Pueblo." He further called attention to the fact that the valuation which was to be the basis of compensation, had not been agreed upon, and requested instructions as to the action which should be taken in regard to this matter. The board referred it to the president with power to act, and requested him "to devise some plan for the early construction of the company's railway and submit the same to" the board.

—— No. 1, Rec., p. 266, fol. 233.

Vaile's Exhibit, No. 9, Rec. p. 389, fol. 697.

On the 8th day of February Mr. Cable telegraphed from Topeka, Kansas, to Mr. Wolcott, requesting him and General Manager Smith to meet him (Cable) at Pueblo on Friday, the 9th; and on the 9th this was answered by Wolcott, saying that Mr. Smith was absent, and suggesting that some delay in the meeting might result.

---Exhibit, No. 37, Rec., 389, fol. 725.

The affidavit of Mr. Low, an attorney of the Rock Island Company, who accompanied Mr. Cable, shows that the latter and Mr. Wolcott had an interview in which the proposed contract was discussed at Colorado Springs, on or about the 11th of February, and that some amendments were then agreed upon; that on 13th there was an interview between Mr. Cable, Mr. Moffat, President, Mr. Smith, General Manager, and J. F. Vaile, upon the same subject, and that the form of the contract was agreed to on or about the 14th of the month.

ROCK ISLAND'S TITLE.

In response to telegrams received from Mr. Cable, Mr. Wolcott sent to him as "President Chicago, Rock Island and Pacific Railroad Company," at Chicago, on the 16th of February, a copy of the contract and of the book containing the record of the proceedings of the incorporators' meeting on the 31st of January. He also states that the contract had been signed and copies forwarded to New York. On the 20th of February Mr. Cable advised Mr. Wolcott that he would go to New York the last of the week and would call on "your people for the contracts that have been executed." On the 25th of February Mr. Wolcott sent to Mr. Cable a duplicate seal, again addressing him as "President C., R. I. & P. R. R. Co."

Vaile's Exhibit No 32. Rec., p. 389, fol. 740.

Vaile's Exhibit No. 11. Rec. p. 380, fol. 698.

Vaile's Exhibit No. 40. Rec., p. 389, fol. 727.

The board of directors of the Chicago Company was convened in New York on the 2d day of March, 1880; and it was reconvened on the 7th. It appears by a report submitted by Mr. Cable as president, that the contract which it was believed had been finally settled at Denver on the 15th of February, had been again amended and altered, and was then submitted for consideration of the directors. The revised form was approved, and the officers of the company instructed to execute it under the corporate seal. When this resolution was passed, the contract, as last revised, had not been executed by any of the parties, and no form of it had been executed by the Chicago Company. The meeting which approved the final draft of the contract, approved a plan of consolidation with the Kansas Company. On the 8th day of March, the directors of the Denver Company authorized the vice president and secretary to execute it on its behalf. At the same time a meeting of the stockholders for the consideration of the contract was called for the 2nd day of May.

Chisholm's Exhibit No 1. Rec., pp. 266, 267, fols. 235-239.

Stipulation, Rec. pp. 1,226-1,227.

The directors of the Chicago Company again assembled on the 2nd day of April, 1888, at the office of the Rock Island Company in Chicago, and by resolution located the route for some distance from the western boundary

Chisholm's Exhibit No. 1, Rec., p. 270, fols. 245 and 263.

ROCK ISLAND'S TITLE.

of the state, in the direction of Colorado Springs. The Articles of Consolidation between the Kansas and Nebraska and the Colorado Companies were submitted to the board and approved, and their execution by the officers and submission to the stockholders directed.

Vaile's Exhibit No. 11. Rec., p. 381, fol. 702.

On the 16th of March, Mr. Cable requested Mr. Wolcott to have the stockholders of the Colorado Company convened at an early day for the purpose of ratifying the contract of May 15th; "also a meeting on the day following for the purpose of ratifying the consolidation with the Chicago, Kansas and Nebraska Railway Company." To this Mr. Wolcott replied on the day following: "Meetings called as requested, for April 30th and May 1st. Mr. Cable was then president of both the Rock Island and the Chicago Companies, but Mr. Wolcott's communication came addressed to him as president of the first named.

Chisholm's Exhibit No. 1. Rec., p. 272, fols. 263, 264.

On the 30th of April the stockholders of the Chicago Company were convened at the Cheesman Block, Denver, and no quorum being present the meeting was adjourned until May 29th. On the 1st day of May another special meeting of the stockholders convened, and adjourned for the same reason until the 29th.

Vaile's Exhibit No. 50, Rec., p. 393, fol. 739.

The record indicates that prior to the 19th day of May, 1889, no certificates of stock in the Chicago Company had been issued to any one. Certificates for shares were filled up as follows: Certificate No. 1, Joel F. Vaile, ten shares; certificate No. 2, W. H. Griffiths, ten shares; certificate No. 3, Harlan P. Parmelee, ten shares; certificate No. 4, Charles W. Betts, ten shares; certificate No. 5, Henry F. Jolly, ten shares—all save one employes of Edward O. Wolcott. These certificates were signed by Mr. Cable, in Mr. Wolcott's office, in the presence of Mr. Chisholm. They were retained by Chisholm, until he was examined as a witness in this case, and were kept by him in the office of Edward O. Wolcott.

Chisholm's dep., Rec., pp. 247, 249, et seq.

Vaile's dep., Rec., p. 357, fol. 607.

Rec., p. 348, fol. 571.

Mr. Vaile testifies that in receiving them the parties

named therein "were merely acting as a matter of courtesy to oblige the gentlemen who were interested in the incorporation of the 'Chicago Company,' and that they hold them as trustees for Mr. Cable, or such other person as he may designate."

Vaile's dep. Rec., p. 349, fol. 574.

On the 22d day of May, the stockholders of the Denver Company ratified the contract of February 15th. Like action was taken by the stockholders of the Chicago Company at the adjourned meeting held in the Cheesman block, at 10 o'clock A. M., on the 19th of May. After the business was transacted, the meeting adjourned until 2 o'clock P. M. of the same day, when, by a unanivote—not only of stockholders present but of all persons to whom certificates of shares had in any manner been delivered—the articles of consolidation with the Kansas Company were "ratified, approved and confirmed," as they had "been signed and sealed by the officers of this company"; and the officers of the company were authorized to do "any and all acts which it shall be necessary on its part to complete and carry said articles of consolidation into full force and effect," and to in every respect complete the same. The stockholders who on the same day ratified this contract and the articles of consolidation, as appears by the record, were R. R. Cable, the holder of one share, Henry R. Wolcott, brother of Edward O. Wolcott, the holder of one share, and the several parties to whom certificates had been issued, as above stated.

—Rec., p. 358, fol. 610.

—Rec., p. 357, fol. 609.

Stipulation, Rec., p. 1,238, fols. 1,118, 1,119.

Chisholm's Exhibit No. 7, Rec., p. 273, fols. 268, 270.

Chisholm's dep. Rec., pp. 274, 275, fols. 271, 277.

The record shows that certificates for fifty-five shares were outstanding, and that the holders of fifty-two shares were in attendance. The testimony shows that five certificates, each for ten shares, had been signed and were then held by Chisholm, in Wolcott's office, as above stated. The matter was explained in the letter of Mr. Wolcott to Mr. Cable, under date of June 10th:

Chisholm's Exhibit No. 1, Rec., p. 273, fols. 266, 267.

"You will observe that in the minutes of the stockholders' meeting it is shown that the total amount of stock issued is 55 shares. When here you signed certificates for 50 shares, being 10 shares for each of the 5

Vaile's Exhibit, No. 51, Rec., p. 394, fols. 741, 742.

ROCK ISLAND'S TITLE.

incorporators? It is, of course, necessary that the directors should each hold at least one share. We have, therefore, treated the matter as if each of the five directors held one share each, and as if fifty-five shares constituted the entire stock outstanding."

Chisholms Exhibit No. 1. Rec., p. 274, fol. 271.

After the stockholders of the Chicago Company approved this contract, they took a recess until 2 o'clock in the afternoon of the same day. They re-assembled at the hour named, the same stockholders being in attendance, and Joel F. Vaile in the chair. A resolution was submitted in which it was declared that the articles of consolidation had been signed by the officers of the company in the exercise of power conferred by the board of directors; that the stockholders have inspected the said articles, and that they expressly ratify, approve and confirm the same. This resolution was adopted by a unanimous vote of all the stockholders, including Joel F. Vaile.

Articles of consolidation Chicago and Kansas Companies, Rec., p. 181.

The articles of consolidation thus ratified and approved were executed by the officers of the parties thereto and under their several corporate seals, as of the date of the 13th day of June, 1888.

Preamble, Div. II, Rec., p. 182, fols. 90 and 91.

The preamble recites, that "the Colorado (Chicago) Company proposes to acquire by construction, purchase or otherwise, and own a railway which will extend from" a point "on the boundary line between the states of Kansas and Colorado, and between the county of Sherman in said first named state and the county of Elbert in said last named state, to Denver, Colorado Springs and Pueblo." By the terms of these articles the constituent companies "consolidate, unite and merge their capital stocks, corporate and other franchises, rights, privileges and property of every nature and description," and "do hereby create by such consolidation, union and merger, one consolidated corporation which shall be known as the Chicago, Kansas and Nebraska Railway," to which they severally "grant, bargain, sell, release, convey, assign, transfer and set over * * * all of their respective

Art. I. Rec., p. 183.

Art. II. Rec., p. 183.

railroads, rights of way, stations, station yards, * * * and all and singular their respective estates, property and effects, real and personal, movable and immovable, wheresoever, howsoever and by whomsoever held;" declaring "that all contracts, bonds, certificates, deeds, and other acts and writings of each of said parties shall continue in full force and effect as the proper contracts, bonds, certificates, deeds, acts and writings of said consolidated corporation."

ROCK ISLAND'S TITLE.

These articles further expressly provide that "the lease executed by the 'Kansas Company' to the St. Joseph and and Iowa Railroad Company, bearing date the 15th day of May, 1886, shall extend to and embrace all property which is now or shall hereafter be constructed, or in any manner acquired by the consolidated corporation in the States of Kansas and Colorado, or in other states and territories as fully and to the same extent as if embraced by particular description in said contract of lease."

Articles Consolidation, Chicago and Kansas Cos., Art. VIII, Rec., p. 186, fol. 109.

They further provide, that the deed of trust executed by the Kansas and Nebraska Company, under date of May 14, 1886, shall "have like force and effect as to all bonds which have been and may hereafter be issued thereunder, and shall be a lien upon all railway and appurtenant property of the consolidated company, thereafter constructed or acquired."

Art. XIII, Rec., pp. 187 and 188 fol. 112.

The capital stock of the consolidated corporation was divided into three hundred and fifty thousand shares, having a par value of one hundred dollars each. It was provided that "all holders of the capital stock of the 'constituent companies' shall henceforth be stockholders of the said consolidated corporation, in like proportional amounts, and with the same rights and liabilities between them severally, and said consolidated corporation as now existed between" them. It was further provided that the stockholders of the constituent companies should have the right to surrender their certificates for shares in the constituent companies and receive in exchange therefor certificates for a like number in the consolidated company.

Art. V, Rec., p. 185, fols 101 103.

Vaile's dep., Rec., p. 348, fols. 570, 571.

Rec., p. 357, fols. 608, 609.

ROCK ISLAND'S TITLE.

The certificate issued to the several parties above named have never been assigned by them, and have never been exchanged for shares of the consolidated corporation.

Vaile's Exhibit Nos. 40 and 52, Rec., pp. 391-394, fols. 732, 743.

These articles were in the office of Mr. Wolcott and subjected to criticism by Mr. Vaile as early as the 27th of the proceeding April.

Exhibit No. 54. Rec., p. 396, fol. 750.

They were filed in the office of the secretary of state for the State of Colorado on the 2d day of July, 1889, and the filing fee was paid by Mr. Wolcott, who drew upon Mr. Purdy as "Secretary C., R. I. & P. R. R. Co." for the amount.

Exhibit No. 62. Rec., p. 398, fol. 758.

The records of the proceedings of meetings of the directors and stockholders of the Chicago Company were kept in duplicate, one copy being retained by W. G. Purdy, Secretary, who resided in Chicago, and the other by Colin H. Chisholm, Assistant Secretary to the Company and Private Secretary to Edward O. Wolcott. In each was recorded the proceedings had by the directors and stockholders to which reference has been made above.

Chisholm Dep., Rec., p. 242; fol. 128, 129.

The copy kept by Chisholm was produced by him when he was examined as a witness, and complainant's counsel insisted that it should be surrendered either to the complainant or to the examiner to be returned into court. The following occurred:

"Mr. WITHROW: Now, the examiner can see the propriety of our insisting upon having this book with this original record.

"Mr. VAILE: This book has been produced by the witness and has been in our possession, in the possession of the witness, as an employe of the office of Wolcott & Vaile, and the complainant in this case has not shown any right of possession in any respect whatever.

Mr. WITHROW: Now, I ask the examiner to record the language of Mr. Vaile, that the book 'is in our possession and is produced by us."

The EXAMINER: He had a right to place himself on record.

The EXAMINER: What I decide I considered just in the matter, and my decision is, that I retain this book subject to the order of the court."

ROCK ISLAND'S TITLE.

The witness testified further that he did not think he had ever received any instructions from Mr. Wolcott as to the manner in which this book should be kept.

Chisholm's dep. Rec., p. 242, fol. 129.

"Q. Did you ever receive any instructions from Mr. Vaile as to the manner in which this record should be made out?

A. I have received instructions from him as to the form to keep it.

Q. And you have been governed by those instructions, haven't you?

A. Very largely, I expect I have."

When the articles were executed the Chicago Company had the franchises secured by its articles of incorporation, the right of way secured by the location of its line across the public lands of the United States and the right secured by this contract—and nothing more. The road was construed after the consolidation with moneys furnished by the Rock Island under its contract with the Kansas Company of May 15, 1886. It was completed about the 1st of November, 1888, and was, after its completion, operated to Denver and Pueblo by the St. Joseph Company under the lease of May 15, 1886, the articles of consolidation and the contract.

On the 22d day of November, Mr. Wolcott addressed to Mr. Cable a letter in which he said:

Vaile's Exhibit No. 75, Rec, p. 403, fol. 804.

"It is now about a year since the negotiations were entered into which resulted in the Denver and Rio Grande contract, and since I advised with you and Mr. Withrow as to the preparation of the articles of incorporation of the Colorado end of the Rock Island R. R. Then and since you have from time to time said to me that you wanted me to represent, in legal matters, your interests here. Since the earlier months, however, when we were incorporating and consolidating the companies, there have but few questions arisen respecting which my services have been needed. * * *

My purpose in writing you is to ascertain whether or not you still desire me to consider myself as occupying any relation to the Rock Island or its associated companies; and if you do so desire, to what extent and what relation?"

Vaile's dep. Rec., p. 374, fol. 675.

This letter was produced in compliance with a demand

ROCK ISLAND'S TITLE.

made by Mr. Vaile and after he had produced Mr. Cable's reply to it.

Vailes Exhibit No. 24 Rec., p. 385, fols. 712-714.

Mr. Cable's answer to this, under date of December 4th, closed the correspondence between him and Mr. Wolcott in regard to the corporation and consolidation of the companies.

On the 21st day of November, 1888, Mr. Low wrote to Wolcott and Vaile:

Phelps' Aff't. Rec., p. 957.

"I have yours of the 20th instant, enclosing copy of petition and summons in the case of Phoebe Jane Beattie against the Chicago, Rock Island and Colorado Railway Company. You, of course, understand that prior to the time of the commencement of this suit, the Chicago, Rock Island and Colorado Ry. Co. had been consolidated with the Chicago, Kansas and Nebraska Ry. Co., and that when the consolidation took effect Mr. Henry R. Wolcott ceased to be a director. * * * This property, on that day [the 15th of November] or that part of it occupied by our railroad was in the possession of the St. Joseph and Iowa Railroad Company."

Vaile's dep. Rec., pp. 372, 373.

Concerning this Mr. Vaile testified, before the letter was produced:

"I find upon examination of some correspondence the following facts:

"That before any matters of difference which required advice on behalf of the Denver and Rio Grande Railroad Company, between that company and the complainant, a case had arisen called Beattie against the Chicago, Rock Island and Colorado Railway Company, as I remember, in reference to the title to a piece of ground near Roswell, in this state, in El Paso county; and our office was requested by some one representing the Rock Island Company, I think it was Mr. Low, to appear for the company and defend that case; and my recollection is that this case was pending at the time of the writing of the letter of Mr. Wolcott above referred to, but that we continued by reason of our connection with that case to carry it through to a determination. I find that sometime in the year 1890, Mr. Low telegraphed to our office asking for an immediate return of a lease and articles of consolidation, and a letter subsequently written by Col. Easley of our office transmitting the lease and articles of consolidation; inferentially it would be the lease referred to, although I do not know such to be the case. But in any event, I would say that this lease was never seen or read by me,

and that Col. Easley had charge of the case of Beattie v. The Rock Island Company as attorney for that company, and that Mr. Low with Mr. Easley had some consultations upon the subject of the case; that in any action with the office, through which Mr. Easley was connected was in behalf of the Rock Island Company, and in no respect was the business connected with the business of the Denver and Rio Grande Company, and I am very confident that no officer of the Denver and Rio Grande Railroad Company could have had knowledge of the existence of that lease from the fact, if it was a fact, that the same was ever in the office of Wolcott and Vaile; and the only knowledge I now have of it is, that in response to counsel's request of yesterday, I looked to see whether there was any correspondence relating to the subject, and find that to which I have referred."

Jilson's dep. Rec., pp. 1,138-1,153, fols. 777-779.

The entire Kansas Railway, including that portion in Colorado, was turned over, as it was completed by sections, to the St. Joseph Company as lessee, under the lease of of May 15, 1886. The caption on the way-bills, letter-heads, time-schedules and all other papers and documents issued in the operation of the railway was: "Chicago, Kansas and Nebraska Railway, St. Joseph and Iowa Railroad Company, lessee." Checks drawn in the settlement of balances in favor of the Denver Company bore this caption, and were signed by Mr. Jilson, assistant treasurer of the St. Joseph Company. Some of these checks bear the endorsement of the treasurer of the Denver Company. Correspondence occurred between the superintending officers of the two companies, and in such correspondence the letter-heads used by the Rock Island Company bore the caption above mentioned.

Stipulation Exhibits Nos. I, II, VII and VIII. Rec., pp. 1,233-1,236.

This continued until a short time after the 1st of January, 1889, when another name was substituted for that of the St. Joseph and Iowa Railroad Company.

Deed. Rec., pp. 188-191; fols. 119, 124, 125, 129.

On the 29th day of December, 1888, the St. Joseph Company executed to the Rock Island Company a deed in which was recited the power of the Kansas Company to own and operate a railway which included that which the Chicago Company was authorized to construct, or otherwise acquire; the lease of the Kan-

ROCK ISLAND'S TITLE.

sas Company to the St. Joseph Company of May 15, 1886; and that the Rock Island Company owned and operated a railway etxending from Chicago to a connection with the railway of the St. Joseph Company at Altamont, in the State of Missouri. The deed by apt phrases conveys to the Rock Island Company all of the railway and railway property of the grantor, "including all right, title, interest or claim of the said 'St. Joseph and Iowa Railroad Company' in and to the railway, property, rights, privileges, franchises and immunities of the Chicago, Kansas and Nebraska Railway Company, which said 'St. Joseph and Iowa Railroad Company' has acquired, or may hereafter acquire, under and by virtue of the said indenture of lease entered into between the said St. Joseph and Iowa Railroad Company and the Chicago, Kansas and Nebraska Railway Company."

Assignment of leases.
Rec., pp. 193-196.

On the 31st day of the same month the Kansas, the St. Joseph and the Rock Island Companies entered into a contract in writing, in which the contract of February 15th, 1888, and others were expressly mentioned and described. The Kansas and St. Joseph Companies by this contract "sell, assign, transfer and set over" to the Rock Island Company the several leases mentioned and described, including that of May 15th, 1886, and that for the joint operation of the line of the said Denver Company between Denver and Pueblo.

Jilson's dep.
Rec., pp. 1,150, 1,151; fols. 771-773.

The Rock Island Company assumed possession of the entire leased line as of January 1, 1889, but the change in the form of bills of lading, letter heads and other papers necessarily consumed several months. On the 31st of December, 1888, a check was drawn in favor of the Denver Company, with a caption as follows: "Chicago, Kansas and Nebraska Railway, St. Joseph and Iowa Railroad Company, lessee," and on the 7th of February another with this: "Chicago, Rock Island and Pacific Railway Company, C. K. and N. Division."

Smith's Exhibit No. 74.
Rec., p. 408; fol. 709.

On the 16th of May, W. G. Purdy, as Vice President of the Rock Island Company, issued a circular letter to

ROCK ISLAND'S TITLE.

all connecting lines, advising them that the Rock Island Company "having assumed operation of the Chicago, Kansas and Nebraska Railway, settlements for freight and ticket balances on business originating on and after May 1st, and for mileage balances on and after April 1st on that line, will be included in settlement with the Chicago, Rock Island and Pacific Railway Company."

Vaile's dep. Rec. p. 350, fol. 378.

Mr. Vaile testified that this notice came to the law department of the Denver Company in July, 1889, as the "basis of an inquiry as to the company against which bills should be rendered, and in whose favor bills should be paid by the defendant company;" and that because thereof he wrote, on the 22d of July, a letter to Mr. Low, who he understood was President of the Kansas Company, and the attorney west of the Missouri river for the Rock Island Company, in which letter he said:

Vaile's Exhibit, No. 71. Rec., p. 407, fol. 798.

"Will you kindly inform us what changes, if any, have taken place in relation of the Chicago, Kansas and Nebraska Railroad Company to the business in Colorado since the consolidation took place with the Colorado Company several months ago. Our attention has been called to the fact that all of the C., K. & N. official paper has been restamped 'C., R. I. & P. R. R. Co.'

"Please advise us as to the company that is now controlling the Colorado lines, and under what arrangement, and with what company the Denver and Rio Grande is now to transact business in reference to the Colorado road, in which they are jointly interested."

Mr. Low answered on the 25th :

—— No. 73, Rec., p. 408, fol. 807.

"Replying to yours of the 23d instant, the railway of the Chicago, Kansas and Nebraska Railway Company, including leased lines, is now being operated by the Chicago, Rock Island and Pacific Railway Company, under a lease."

Vaile's dep. Rec., p. 351, fol. 582.

Mr. Vaile testifies that he "understood and believed from this letter that there had been some lease made by the Kansas Company, as a consolidated corporation, and subsequent to the consolidation, to the Chicago, Rock Island and Pacific Railway Company"; and acting upon that belief, "I advised the defendant company to make

ROCK ISLAND'S TITLE.

and receive bills to and from the complainant company on the theory that it was a direct lessee of the consolidated company, known as 'The Chicago, Kansas and Nebraska Railway Company'"; and that he first learned that there had been no new lease by the consolidated company after the commencement of this litigation. He says further: "I did not claim that this was any misstatement of the relation which the Chicago, Kansas and Nebraska Railway Company was assuming, but it conveyed to my mind, in view of what I had asked, the idea that" the consolidated company had made the lease.

Vaile's dep. Rec., p. 360, fol. 620.

Cross-bill. Rec., p. 63, near bottom of page.

On the 29th day of July, 1890, the defendant filed a cross-bill in this cause, in which it prayed "that the complainant be, by the mandatory order of this honorable court, required to transport all its cars, engines, trains and traffic to and from Denver by way of defendant's line by way of Colorado Springs."

Original bill. Div. IX, Rec., pp. 6 & 7.

The original bill set out the paper title on which the Rock Island company relied; and Mr. Vaile insists that his first knowledge of the deed and assignment of leases by the St. Joseph Company was received by him when he read the bill. When his attention was called to the fact that with this knowledge in his possession, the cross-bill above mentioned was filed, he said:

Vaile's dep. Rec., 351, fol. 582.

"The cross-complaint, with the accompanying paper attached to which you refer, was not prepared by me, but was prepared by Col. Easley in my absence; I did not even read over the prayer portion of the complaint, at the time of the previous hearing. I think the prayer of that cross-bill should be modified and changed, and we are contemplating asking for a modification of the prayer of this cross-bill, in order that the real issue may be properly presented; and I would further say, that in view of the necessity at that time under your notice of having an immediate hearing, there was not the time to canvass the subject and understand it as thoroughly as the subsequent introduction of your evidence and more leisure time enables us to do."

He states further, however, that Col. Easley was an attorney of the Denver and Rio Grande Company in that

matter and had authority to draw the cross-bill as it was drawn and filed. ROCK ISLAND'S TITLE.

In the next succeeding division of this abstract will be found a statement of the testimony tending to show that it was the common rumor in Colorado when the contract of February 15, 1888, was first settled that the Rock Island was the real party extending its line into that state.

II.

AS TO THE EXCEPTIONS AND LIMITATIONS CONTAINED IN ARTICLE I, SECTION I, OF THE CONTRACT OF FEBRUARY 15, 1888.

1. The exception of the shops at Burnham.

The complainant in the second amendment to its bill alleges: THE SHOPS AT BURNHAM.

—"that defendant insists that a certain coach track at Burnham on which both complainant and defendant placed their passenger coaches for cleaning, is a part of the shops at Burnham within the exceptions of the grant made in section 1, article II, of the contract of February 15, 1888, and that a certain track known as the Wye, near Burnham, is also covered by said exception, and this, notwithstanding the fact that said coach track was a portion of the property embraced in that described in section 1, article II, of said contract, and was covered by the valuation of said property in said contract set out, while the value of the land on which such Wye track is situated was covered by such valuation, and the cost of constructing the same has been incorporated in the capital on which complainant is paying, as provided by said contract, interest at the rate of two and one half per centum per annum." *Coach and Wye tracks.* *Second amendment to the bill. Div. XVI.* Rec. p. 100.

The prayer of the original bill was also amended in such manner as to pray the court to "declare what premises and property are embraced in the exception, 'Burnham shops,'" in section 1, article II, of the contract of February 15, A. D. 1888, and grant such other and further and different relief as to the court and equity shall seem meet. —Rec., p. 2.

SHOPS AT BURNHAM.
Coach and wye tracks.

The defendant, by its amended answer, denies that the said coach track was a portion of the property embraced in the description contained in section 1, article II, of said contract of February 15, 1888, or was "covered by the valuation in said contract set forth, and denies that the value of the land on which said Wye track is situate was covered by such valuation."

Amended answer, Rec., p. 137.

It admits that the cost of the construction of said Wye track was incorporated in the capital sum by agreement of the parties, but "without prejudice to the question as to whether or not the land on which the same was situated was or was not included in the property to the joint use of which said Chicago Company was admitted by the terms of said contract": that by the term "shops at Burnham," which, by the provision in said contract of February 15, 1888, were specially excluded from the operation thereof, was meant and intended, and at the time was well understood by the parties to said contract to mean the buildings, ground, tracks and all facilities appertaining to the premises which the defendant company then used for the construction, repair, cleansing and supplying its engines, cars and trains, with certain adjacent land then reserved for like purposes, and it was distinctly understood and agreed that said "shops at Burnham" included all the land of the defendant company lying west of defendant's main track and south of 12th avenue, in the city of Denver, together with all the buildings, tracks, structures, fixtures, appliances and appurtenances thereon situated; that no part of said premises was included in the valuation of $3,000,000 in said contract set forth, and that the value of no part of the same has ever been included in the capital sum on which the Chicago Company or complainant has paid interest."

That—

Amended answer, Rec., p. 139.

"at the time of the negotiations resulting in said contract of February 15th, 1888, the subject of the use of the shops at Burnham and property appurtenant thereto was considered between the parties to said contract, and the promotors of the said Chicago Company, on the one

SHOPS AT BURNHAM.

part, and of the officers of the defendant company on the other, and it was at that time stated and distinctly understood by the parties that the complainant was not by said contract to acquire any facilities at Burnham to be used for the purpose of repairing or cleaning its cars, and it was then contemplated and agreed by said parties that the complainant would either employ the defendant with the facilities it possessed to perform said work for the Chicago Company, upon such terms as should be agreed upon by the officers of the respective companies, or that in the event of failure so to do the said Chicago Company would build or otherwise acquire its own separate facilities therefor; and that in view of such understanding the question as to the care, repair and cleansing of cars was omitted from said contract and forms no part thereof; and thereafter and after the commencement of the joint operation of the railway property in said contract described, this defendant, as a matter of courtesy and for the purpose of accommodating the said Chicago Company, suffered and permitted the said Chicago Company and said complainant to have their cars repaired, cared for, cleansed and supplied at its shops at Burnham, rendering reasonable bills therefor; that the Chicago Company has not, nor has the complainant, at any time from the date of the execution of the said contract to the present date, given to the defendant any notice whatsoever of its desire for any facilities or conveniences in the nature of places or buildings, or any character of structure, at or about Denver or Burnham, to be used for the purpose of repairing, cleansing, supplying or otherwise caring for the cars of said Chicago Company or of the said complainant, as provided by section 1 of article III of said contract; nor has the said Chicago Company or the said complainant at any time constructed at Denver or Burnham any such separate facilities or conveniences for such purpose."

Coach and Wye tracks.

Amended Answer. Rec., pp. 137, 138.

It is further alleged that certain structures called coal-chutes form a part of the shops at Burnhan and were excluded as a part of the Burnhan shops; but

Coal-chutes.

—" that said coal-chutes are situated west of but very near to the west main track of defendant's line of railway aforesaid; that at the time of the negotiations immediately preceding and succeeding the execution of said contract, said coal-chutes were the subject of conversation between the general manager of the defendant company and the president of the said Chicago Company; that in said conversation it was expressly understood and agreed that

Amended Answer. Rec., p. 139.

SHOPS AT BURNHAM.

Coal-chutes.

Amended Answer. Rec., p. 139.

the said coal-chutes were, by the terms of said contract, excluded from the said granted premises; that in view of the fact that said coal-chutes were conveniently situated for the purpose of supplying the locomotives of the said Chicago Company and of the complainant as well as the defendant, with coal, it was, after the execution of said contract, agreed between the said president of the Chicago Company and the general manager of the defendant company, that the use of said coal-chutes should be accorded to the said Chicago Company, and the same have from the time of the commencement of the operation of defendant's line by the said Chicago Company, and during the occupation of the same by the complainant, been used by the said Chicago Company and the said complainant, as the source of supply for fuel for its locomotives; that by reason of such common use of such coal-chutes, and after the execution of the contract hereinabove mentioned, by consent of both parties hereto, the cost of certain extensions and changes in said coal-chutes was added to the principal sum upon which the complainant has been paying interest at the rate of two and one-half per centum per annum; that the cost or value of said coal-chutes, as the same existed at the time of entering into the said contract, has never at any time been added to the said valuation upon which the said complainant has been paying interest; and that the cost of said extensions and changes has been added by arrangement between the parties since the execution of the said contract as aforesaid."

Map sent by Ricker to Parker.

Parkers dep. Rec., pp. 1,091, 1092, fols. 527–534.

In the early days of and prior to the 10th of December, 1887, H. A. Parker, Vice President and Chief Engineer of the Kansas Company, passed over the railway of the Denver Company between Denver and Pueblo, for the purpose of ascertaining its condition and making an estimate of its value, for the information of the officers of the Rock Island Company, with a view to the proposed contract. When returning from this trip he met General Manager Smith on the line and requested that he cause to be sent to him a statement showing the terminal facilities at Denver, Colorado Springs and Pueblo.

Stipulation Exhibit No. 2. Rec., p. 1,235, fol. 1,111.

On the 10th of December, 1887, Mr. Smith wrote Mr. Cable:

"I met Mr. Parker on the road after his trip over the line from Denver to Pueblo, and he informed me that he

had all the information and co-operation necessary to properly carry out the object of his trip. The only additional request he had to make was that we would get up a statement showing the area of our terminal facilities at Denver and Pueblo, which will be done at the earliest practicable date."

SHOPS AT BURNHAM.

Map sent by Ricker to Parker.

On the same day, Mr. Parker submitted to Mr. Cable, an estimate of the value of the Denver Company's railway between, but not at Denver and Pueblo. The distance was 117 miles, and the valuation $15,830 per mile, including thirty acres of land at Colorado Springs, valued at $75,000. This valuation amounted to $1,862,110, excluding the property at Denver and Pueblo—Burnham being a part of Denver. Mr. Parker testifies that it was conscientiously made.

Parker's dep. Rec., pp. 1,090-1,095; fols. 523-541.

At the interview between Mr. Wolcott and Mr. Withrow, at Chicago, about the 17th of December, Mr. Wolcott produced a map showing the property at Burnham and said to Mr. Cable, that he assumed that "we would not want to use their shops, and they would want to reserve the shops for their own use." He called Mr. Cable's attention only to the structures which were indicated on the map without pointing out "any ground adjacent to the shops." The words "excluding the shops at Burnham" were then incorporated in the draft which was agreed upon by counsel. On the 7th of November, 1890, Mr. Wolcott filed in this cause his affidavit in which express mention is made of and extracts taken from the affidavit of Mr. Cable, but no reference is made to Mr. Cable's statements in this regard.

Cable's Affi., Rec., p. 699; fol. 1,910.

Wolcott's Affi., Rec., pp. 939-943.

On the 21st of that month R. E. Ricker, the chief engineer and general superintendent of the Denver Company, forwarded to Mr. Parker, "by express, maps of our depot grounds and property at Denver, Pueblo and Colorado Springs, showing the number of acres of land owned by this company at these places." Mr. Ricker states that he does this "by direction of the general manager;" and the general manager testifies that he "left instructions at various times that he should furnish

Exhibit No. 21, Rec., p. 880; fol. 2,601.

Rec., p. 835; fols. 2,433, 2,434.

SHOPS AT BURNHAM.

Map sent by Ricker to Parker.

Mr. Parker and Mr. Cable any maps or other data that he had referring to the property of the company between Denver and Pueblo." Two maps are produced by Mr. Cable and identified by Mr. Day as the maps which were received from Mr. Ricker. Mr. Smith says: "that he has no doubt they were the ones sent by Mr. Ricker, and that they were sent for the purpose indicated in his letter. These maps are in testimony and in the record.

At this stage of this statement the attention of the court should be called to some of the characteristics of this documentary evidence. The title of the map is as follows: "*A new map of the Denver and Rio Grande Railway shops at Burnham, near Denver Col., showing all tracks, buildings and other improvements. Compiled from special surveys made under direction of Chief Engineer, J. A. McMurtrie, by H. H. Rogers, Asst. Engr. Survey began Feb. 1st, finished Feb. 29th, 1884.*" At the other end of the map is a table of "alignment notes of main tracks hereon shown." This shows that the "main tracks" are designated by the letters A, B, D, E, N and the words "main line," and that the word "line" is used on the map instead of the word "track." Another table shows by whom the several parcels were conveyed to the company and the quantity of land in each parcel. On the map appended to this abstract the boundaries of the several parcels are colored red, as they were on this map. The names of the parties by whom each parcel was conveyed to the Denver Company is also written upon the face thereof. The "main tracks" or "lines" described in the table are colored blue on this map. Upon consulting it the court will observe that "main tracks" A and B, are a continuation of one of the two main tracks extending from the Denver yard to Burnham yards, and that they spring from it near the east line of what is known in the record as the "Burlingame tract," the most northerly parcel which is claimed to be a part of the "shops at Burnham." "main track 'A'" marked on the map "line A" extends from this point through the parcel conveyed by C. H.

SHOPS AT BURNHAM.
Map sent by Ricker to Parker.

Bartels, to the extreme western portion of the company's property; thence southerly on a line near to and nearly parallel with the western boundary of said parcel, across that conveyed to the company by Middaugh, across the south-west corner of the parcel conveyed by Clark and Hotchkiss, diagonally across block 44, into what is known as the Bailey tract, lying immediately north of Vasquez street. It is the most westerly of all the company's tracks, while the "main line" is the most easterly—all of the shop buildings being located between. "Main track "N" extends from its point of connection with the track extending from the Denver yards to the Burnham yards, a little way north of the point where the same track is intersected by "main track A," and runs southerly nearly parallel with the "main line" on the east side of the coal-chute, to a point between the north line of the Bailey tract and Martin street, at which it intersects with the "main line." It is located between the shop buildings and the "main line" on blocks 26, 27 and 43, Hunt's Addition, and the parcel conveyed by Clark and Hotchkiss. "Main track B" springs from the "main line" near the north boundary of the Bailey tract and extends in a north-westerly direction to the round-house; from the north-westerly side of the round house in a westerly direction to the coach shops and the paint shop, thence to a connection with "main track A" near the south boundary of the "Burlingame tract." It is located on block 43, Hunt's Addition, and the parcels conveyed by Clark & Hotchkiss and Bartels. "Main track D" springs from "main track B" in block 43, and extends north-easterly between the round-house and the freight car shops; thence almost due north between the machine shops and the general store building to a connection with "main track A," south of the coal-chute. It is located on block 43, and the parcel conveyed by Clark and Hotchkiss. "Main track E" in the table of alignment is "main track F" on the map. It springs from "line B" in block 42, and extends through block 43 and the parcels conveyed by Clark and Hotchkiss by the south end of the machine shop over the pit.

SHOPS AT BURNHAM.

Map sent by Ricker to Parker.

These main lines were traced upon the map when the tracing was made in 1884—over three years before these negotiations commenced. "Blue Print" number two, produced by Mr. Cable, sent by direction of the general manager to Mr. Parker, was from the same tracing and was made by tracing red lines on the boundaries of the different parcels which the company owned, and noting upon each the quantity of land it contained. There was also written upon the face of the blue print a list of the property therein bounded with extensions of their several quantities under the heading, "Approximate acreage of D. & R. G. property." In this, one parcel is described as "Shop grounds" containing forty acres. It embraces blocks 43 and 44, out-lots 11, 12 and 13, and the parcels conveyed by Clark, Hotchkiss, Bartels and Middaugh. It includes no part of blocks 26 and 27 or of the Bailey tract. All of the shop buildings and nearly all of the main tracks indicated by letters were located upon the so-called "shop grounds." This statement is upon the map appended to this abstract. It shows that the entire acreage at Burnham was 91.38 acres. The map No. 1, also sent by Picker & Parker, showed that the acreage in the yard near Chiny Creek was 22.42 acres. The company had also occupied 10 acres of a street which ran through the Chiny Creek yard.

When the original tracing was made in 1884, shirred lines were placed on the outer boundaries of all lands which the company owned, including the right of way north of Vasquez street, and south of the line between sections 3 and 4. There are no such lines on any of the boundaries of the Burlingame tract. It was not owned by the Denver Company when the tracing was made in 1884, but was acquired in 1887 before the blue print was sent to Mr. Parker on the 21st of December, in that year.

Returns for taxation.

It is the duty of the State Board of Equalization of the State of Colorado to assess all of the property in said state "belonging to railway corporations, except lots or parcels of real estate owned by the road within each

county, and improvements thereon, and except depots, machine shops and other improved property connected with such road and located within any county, which shall be taxed in the county where situate." To enable the state board to make this assessment, the company is required by some general officer to report: SHOPS AT BURNHAM.

(1.) "The whole number of miles owned, operated or leased in the state." *Returns for taxation.*

(2.) "The value thereof per mile."

(3.) "A detailed statement of the number and value thereof of engines, passenger, mail, express, baggage, freight and other cars or property owned by such railway and on railways which are a part of its line extending beyond the limits of" the state.

(4.) The "actual proportion of the amount and full cash value of the rolling stock in use on the corporation's line which is necessary for the transportation of the freight and passengers, and the operation of the railroad in" the state.

The State Board is required to make an assessment in which the said property "shall be valued at its full cash value," and which shall cover "the entire railway within this state, and shall include the right of way, road-bed, bridges, culverts, rolling stock, depots, station grounds, buildings and all other property, real and personal, exclusively used in the operation of such railway." This assessment of "all property exclusively used in the operation of the railway," is covered by a valuation of the entire main track, which is apportioned to the several counties into or through which it runs, on the basis of mileage.

The excepted property is assessed by the authorities of the several counties in which it is located. The law requires returns of this property to the proper county assessor in compliance with forms prescribed by the county commissioners.

On the 10th day of May, 1887, several years after the tracing, which is the basis of this map, was made, and *Schedule A, appended to stipulation.* Rec, p. 958.

SHOPS AT BURNHAM.

Returns for taxation.

several months before the map was sent by Mr. Ricker to Mr. Parker, the land and tax agent of the Denver Company, filed in the office of the county assessor of Arrapahoe county, Colorado, in which Burnham shops are located, a schedule of the property of its property in that county, "which is not already assessed" by the state board, and stating that the lots and lands therein "described as pertaining to the right of way, are duly included in the mileage of the right of way and sidings, returned by said company to the State Board of Equalization." A comparison of the lands reported as right of way and sidings," disclosed by forms "A, A, A," and "D, D, D," shows that of the sixteen and one-half acres conveyed by Clark and Hotchkiss (returned in form A, A, A, as "Burnham"), seven and eight-tenths acres were returned as right of way; that of the ten acres conveyed by Bartells, seven and eight-tenths acres were returned in the same way; that of the four and three-tenths acres conveyed by Middaugh, one and six-tenths acres were so returned; that of the twenty acres conveyed by Bailey (all of which was west of the original right of way), four and one-half acres were so returned. The form "D, D, D," shows that all of block 26 and the west one hundred feet of block 27, Hunt's Addition to Denver; all of outlots 11, 12 and 13, in the same addition; lots 1 to 5 and 26 to 38, in block 43; lots 1 to 4, and 23 to 36, in block 44, were also returned as right of way for main tracks and sidings.

See affidavit appended to the "Schedule."

Valuation of property.

Mr. Cable did not visit Denver after the interview with Mr. Wolcott on the 17th of December, 1887, until the 14th day of February, 1888. He then had one or more interviews with General Manager Smith; and in these, the valuation to be placed upon the property was agreed to.

There is a conflict of testimony as to what was said and done at this interview or these interviews. Mr. Vaile testifies as to one on the 15th, and this is his statement of what occurred:

Vaile's dep. Rec., pp. 312, 313, fols. 423–427.

"I remember distinctly a meeting with Mr. Cable, Mr. Low, Mr. Moffat, Mr. Smith and myself. I do not think that Mr. Wolcott was present, and I do not now remember any meeting at which he was present in which I participated."

* * * * *

"If you will permit me to relate the circumstances as I remember them, it will answer your question and at the same time explain. On February 15, 1888, Mr. Low and Mr. Cable came to our office; I went over the contract as made with Mr. Low, and we then went to the office of Mr. Moffat and had a conference with the gentlemen I have named, in which I suggested some slight changes in the contract; they were of comparatively small importance, and I do not now remember what they were. * * * I understand, however, they were agreed to, and that on that day the contract was executed by Mr. Moffat, as president of the company, and on the next day, as I now remember, the executed contract was sent to New York, and a copy to Mr. Cable."

Smiths "off hand line."

Smith's dep. Rec., pp. 738–740, fols. 2,058–2,065.

Mr. Smith testified that when the negotiations were in progress a "blue print" was before the parties; that Mr. Cable asked him where he "considered the dividing line was between the right of way and the property coming under the agreement and the shop grounds"; that he "told him it included everything east of a point from the coal-chute east of the office ground and extending south to the shop grounds, where it connected with the usual right of way of fifty or one hundred feet, I don't remember which, and excepting the leaders that went into the shop"; that "a part east of the line" would come under the contract, and "that a part west of it would not"; that he made on the blue print before the parties "a sort of an off-hand line with a red pencil"; that "it started from the north-east corner of the coal-chute and ran up to the office building, along until the line connecting with the right of way at a point south of where the connections connected with the track into the round-house"; that "it was not a well defined line, it was just off-hand, without any rule or idea of making any lines clear across"; that "it was really to illustrate in the conversation what was meant and intended." Mr. Smith states

Rec., pp. 775, 777, fols. 2,198–2204.

Smith's dep. Rec., p. 852, fol. 2,493.

— Rec. p. 863, fol. 2538, 2539.

SHOPS AT BURNHAM.
Smith's "off-hand line."

further, that he told Mr. Cable that "everything east of this line described was to go into the valuation and be considered as joint property and worked under joint interests; west of that was to be considered shop grounds and was not to be included in the valuation," and that Mr. Cable "suggested that with a dividing line drawn in that manner they would be excluded from the coal-chute as they were then and now located, and I replied to that by stating that there would be no trouble about that, that we would arrange to give him access to the coal-chutes, and with that statement on my part he seemed to be satisfied with it." This was the only line made to show the eastern boundary of the shop grounds.

Map sent by Ricker to Parker.

During the examination, the following questions and answers occur:

Smith's dep. Rec., pp. 799, 800, fols. 2292–2296.

"Q. Here is a map that was sent from your chief engineer's office by your chief engineer, by your direction, showing that that shop grounds there embraced forty acres of land. How do you reconcile that with you statement that at that time your shop grounds embraced over sixty acres?

(Objected to by Mr. Wolcott because the question states an assumption which is not verified by the testimony. The witness has never stated this map was sent by his direction.)

Q. If this map was sent from your chief engineer's office by your direction for the purpose of showing the amount and acreage of your lands at Burnham, please state how you reconcile this statement that the shop grounds consisted of forty acres, with the claim you made to Mr. Cable that the shop grounds embraced over sixty acres?

A. I never could reconcile these two statements, and the map was never sent by my direction from the chief engineer's office of the Denver and Rio Grande Company to the Rock Island officials or to any other person.

Q. You are certain of that?

A. Yes, sir, I am certain of that.

Q. Would your chief engineer send out a map with a statement that it was sent by your direction, unless it was true?

A. I don't know whether he would or not; if he did, it was entirely unauthorized, and if I had known it I would have stopped any such thing as that, because I had a knowledge myself of what comprised the shop grounds

and what were outside of the shop grounds, without having to refer to the chief engineer or to any other person on that ground. SHOPS AT BURNHAM.

Map sent by Ricker to Parker.

Q. Do you say you never authorized Mr. Ricker, who was your chief engineer at the time, to send that map to any officer of the Chicago, Kansas and Nebraska or the Chicago, Rock Island and Pacific Railway Company?

A. No, sir, I wouldn't say that; I might have said to send a blue print from any tracing we had in the office, but I do say most positively and emphatically, that I never authorized the chief engineer or any other person to send out any map or data that would confine our shop grounds or reduce our shop grounds from the limits I have described in my testimony.

Q. Then you think perhaps this may have arisen from the fact that you and your chief engineer did not agree as to what did constitute the shop grounds at Burnham?

A. I have never had any disagreement with the chief engineer or any other subordinate official.

Q. But if he understood the shop grounds embraced but forty acres and you claimed it embraced over sixty acres, there was a very great disagreement between you there?

A. Oh, the way you state, yes, a disagreement as to what the amount was."

Smith's "off-hand line."

Mr. Smith marked upon the blue print which he exhibited, the line which he said was indicated to Mr. Cable and which was marked in Mr. Cable's presence. This blue print, or a copy thereof, is in testimony. The map appended to this abstract is, with the exception of the lines in blue, red and yellow, an exact copy of that portion of the map which covers all that is claimed to be a part of the "shops." The green line on the west side of the "main line" is the one which Mr. Smith says he drew in Mr. Cable's presence.

Smith's dep.

Rec. pp. 776, 777, fols. 1,205, 2,210.

Mr. Smith thinks this may have been as early as November, 1887, but will not state positively. He says further that Mr. Moffat, Mr. Cable and he were present at all of the interviews, and that Mr. Low and Mr. Parker were present at one.

Mr. Smith was examined on the 4th of November, 1890. On the 7th of the same month Mr. Moffat made

—Rec., p. 774, fol. 2,196.

SHOPS AT BURNHAM.

an elaborate affidavit, and this is what is therein stated concerning this interview:

Smith's "off-hand line."

Affiant —"never had, as he remembers, any personal conversation with the said Cable as to what was deemed and intended to be included in the exception of the Burnham shops from the operation of the contract, but that this matter was left to be determined by Mr. Cable and by Mr. Smith, general manager of the defendant. Affiant had several talks with Mr. Smith in the course of the negotiations, and is of *impression* that Mr. Cable was present at some of these interviews, *but as to this he is not sufficiently certain to testify under oath.*"

Moffat's Aff't., Rec., p. 937; fols. 210, 211.

This affidavit contains no statement whatever as to the alleged interview between Mr. Smith and Mr. Cable, or as to the alleged production and marking of any map in such interview.

Mr. Cable testifies concerning this matter:

Cable's Aff't. Rec., p. 894; fols. 34, 35.

"No other map (than the one sent by Mr. Ricker to Mr. Parker) showing the depot grounds and property of the Denver and Rio Grande Railroad at Denver (which included Burnham), Pueblo and Colorado Springs, or any part thereof, was exhibited to him by any one, or came under his notice, prior to the execution of said contract, bearing date the 15th day of February, 1888, except a map exhibited to this affiant, at Chicago, by F. O. Wolcott, as stated by this affiant in his deposition taken in this cause on the 3d day of November, 1890."

Conversation. Cable's aff't. Rec., pp. 892-893; fols. 24-31.

He refers to certain allegations contained in the defendant's amended answer and cross-bill, to the effect that by the use of the term "shops at Burnham," it "was intended and was understood by the parties to the contract, at the time, to mean the ground and tracks and property appurtenant thereto, which the defendant used for construction and repair exclusively, and to supply its engines, cars and trains, with certain adjacent land reserved for like purposes"; that it "was distinctly understood and agreed that said shops at Burnham included all the ground of the defendant company lying west of defendant's main tracks and south of Thirteenth avenue

in the city of Denver;" and to the statement "given out in speeches, that in the valuation of the property covered by section 1 of Article II of the contract of February 15th, 1888, as set forth in said contract, a certain map was exhibited to" him "showing distinctly that certain grounds not occupied by the shops were reserved as a part thereof"; and he characterizes "each and every of said statements, including those contained in the cross-bill, in the amended answer and in said speeches" as "false without limitation or qualification," and declares positively, that neither at the time said agreement was made nor at any time previous thereto, was it known to the complainant or its officers or agents that any claim was made by the defendant, that the phrase, "shops at Burnham," used in said contract, embraced any property other than the buildings and tracks located at Burnham and used exclusively in the manufacture and repair of railroad appliances—and that "no hints or suggestion, or assertion to the effect that any of the lands situated at Burnham and not so actually occupied by said shops and tracks formed any part of, or were included in "Burnham shops."

SHOPS AT BURNHAM. *Conversations.*

As before stated, Mr. Low was present at the interviews at Denver on the 14th and 15th of February, between Mr. Cable on the one part and President Moffat, and General Manager Smith on the other. He says, "that while the valuation of said property was being so discussed, there were upon the table in the room of the said S. T. Smith, maps showing the property of the Denver and Rio Grande Railroad Company at Denver and Burnham, which maps were either the first and second maps produced by R. R. Cable, on the taking of his deposition in this cause, on the 3d day of November, 1890, or, as this affiant verily believes, duplicates of said maps, with the possible exception that the red line produced on the maps shown by the said Cable may not have been on the maps then in the office of the said Smith; that at none of the meetings aforesaid was there in the presence of this af-

Low's Affl., Rec., pp. 908, 909, fols. 99–103.

THE YARDS AT BURNHAM.

fiant, any discussion or statement from any source respecting the quantity of ground meant to be embraced within the phrase 'shops at Burnham'; nor did any person place on any map, in the presence of this affiant any marks or lines indicating in any manner the grounds intended to be excepted from the operation of said contract by the phrase, 'excluding its shops at Burnham'; nor was any map exhibited at any such meetings or at any other meeting at which this affiant was present, which indicated that any ground outside of that occupied by the shops at Burnham was to be excluded from the operation of said contract."

Smith's dep. Rec., 783, fol. 223.

Mr. Smith is not certain that the maps produced by Mr. Cable were not exhibited at these interviews. He "thinks" they were not so exhibited, but declines to say positively that they were not. As to one fact all are agreed, that the basis of all maps exhibited was the tracing made in 1884.

The red line drawn in an "off-hand" way on the "blue print" which Mr. Smith says he produced, (the green line on Appendix hereto) excludes, if it governs, all lands and tracks west of a line drawn between the "main line" and "main track" or "line N." It concedes to the complainant the right to use only the main line.

Valuation.

Smith's dep. Rec., p. 771 fol. 2,185. —Rec., p. 772, fols. 2288-2290.

Mr. Smith produces a memorandum of valuation which is in his own handwriting, but which he thinks Mr. Cable saw. It is dated February 16, 1888, the day after Mr. Cable left Denver. This memorandum was as follows: "Terminal facilities, Denver, $700,000; franchises, $300,000; terminal facilities, Pueblo, $200,000; 120 miles R. R. @ 18,000, $2,160,000:" aggregate, "$3,360,000; deducted arbitrarily, $360,000; aggregate value of road, $3,000,000."

Burn's dep. Rec., p. 604, fol. 1,869.

Bayaloas affi. Rec., pp. 927-929.

The testimony does not show the acreage of the yards at Pueblo, but it does show that when the yards at Denver were in cases of blockade accommodating 800 cars per day there was being handled daily in the Pueblo yards an average of 744 cars. The valuation of the Pueblo facilities covered the shops. In the valuation of the Denver terminals the shops were excluded.

SHOPS AT BURNHAM.

He says that this result was reached as follows: "I had a memorandum of the estimated value of the main line outside of terminals presented to me, and to which I made some changes by additions, or deductions, to make round numbers and to which I myself added what I considered a jumping guess at the value of the terminals at Denver and Pueblo;" that the $700,000 valuation, in the memorandum of "terminal facilities at Denver" included the railroad and adjacent ground, the property of the Rio Grande Company outside of the shop business;" that the "terminal facilities at Pueblo" included "the yard and shop grounds used by the Rio Grande for railroad purposes;" that the $18,000 per mile for 120 miles of railway was not the valuation made by Mr. Parker, Mr. Briggs and Col. Eicholtz, but "an arbitrary sum agreed upon."

Valuation.

Smith's dep.
Rec., pp. 771-772, fols. 2,185-2,188.

The defendant introduces in evidence a map, a portion of which is incorporated in the record, which shows that many alterations have been made at Burnham, since the making of the contract of February 15, 1888. Then there was but one "main line" on the east side of the grounds—now there are two, one "east bound" and one "west." This map does not show where the "off-hand line" was with regard to these "main lines," or either of them. In 1888 there were no tracks on the east side of the so-called main-line—this map shows that several are there now. It also shows that instead of the land west of the "off-hand line" having been acquired and held for shop purposes, the original main tracks and right of way from the "coal-chute" near West Eleventh avenue to Sixth avenue was west of that line.

"Main Lines."

Map marked "T" F. W. & J. F. V. No. 2."
Rec., p. 1,225.

On the 14th day of May, 1888, the land and tax agent of the Denver Company made the annual return of the property of the company in Arapahoe county for assessment. It was in all respects like the one made in May, 1887. The affidavit appended thereto declared, "that the lots and lands herein described as pertaining to right of way are duly included in the mileage of the right of way and sidings returned by said company to the State Board of Equalization of said State of Colorado."

Returns for Taxation.

Schedule B appended to stipulation.
Rec., p. 958 *b*.

SHOPS AT BURNHAM.

Proposed yard.

Middleton's dep. Rec., 219; fols. 41, 42.

—Rec., p. 220, fol. 46.

Proposed yard.

There is in the record a tracing produced by Mr. Middleton, office engineer of the defendant, which bears the following title: "*Denver and Rio Grande Railroad Company. Proposed yard at Burnham. Office of Engineer. June 13, 1886,*" and showing a yard embracing a great number of tracks extending from a new track connecting one of the main line tracks on the east side of the grounds and main track A, on the west side from the round-house and freight-car shops north of blocks 43 and 40, and extending south over those blocks, the Bailey tract, across Vasquez street, the J. L. Bailey tract, blocks 2, 3, 6 and 7 in Longmont, and a considerable distance south of Santé Fe avenue. From Seventh avenue, or Martin street, to immediately south of Santa Fe avenue, this yard covers right of way which it is conceded was demised by the contract. With the exception of four spur tracks on the east side of the proposed "erecting and repair car-shop" which it was proposed should cover the site of the existing "freight-car shop," all of the tracks converge to direct connections with the "main tracks," "main tracks A and B," to turn tables, or to leading tracks which intersect the "main line." The property south of Vasquez street was not owned by the Denver Company. The other grounds which would be covered by the proposed yard were owned by it.

Mr. Cable testifies:

Cable's Aff.

Rec., pp. 804, 805, fol. 35–38.

"In the month of November or December, 1888, S. T. Smith, General Manager of defendant, submitted to affiant a proposition to acquire at joint expense the tract of land lying south of the so-called shop grounds and west of the main tracks at Burnham, known as the Bailey tract, shown by said map, and to construct on the ground lying immediately south of the shops and including said Bailey tract, and the tract so to be acquired, a system of tracks which would occupy all or nearly all of the same, and constitute an operating yard appurtenant to the main tracks of said railway company; at the same time submitting to this affiant a map of such proposed tracks, a copy of which map is entitled 'Denver and Rio Grande R. R. Proposed yard at Burnham, June 13, 1888,' and numbered 6—768, and referred to in the deposition of Charles H. Middleton, taken in this cause on the 3d day of November, 1890, as Exhibit No. 3; that this affiant

SHOPS AT BURNHAM.
Proposed yard.

assented to said proposition and was subsequently informed that it had not been executed only for the reason that the attempt to acquire the title to the Bailey tract had not been successful; that when said proposition was made in the latter part of the year, 1888, there was no pretense upon the part of the officers of defendant company that complainant would be required to make any additional payment on account of the property then owned by the latter company lying south of the shops and west of the main track."

Mr. Low testified:

Low's affi. Rec., p. 909, fols. 104-106.

"That during the month of November, 1888, he visited the office of S. T. Smith, General Manager of the Denver and Rio Grande Railroad Company, in the city of Denver, with said R. R. Cable, and that while in said office said Smith exhibited to said Cable and this affiant a map showing the railroad tracks proposed to be constructed south of the shops at Burnham and asked said Cable to assent to the construction of such additional tracks and to the purchase of the land necessary to the construction of such tracks; and that the said Cable then and there assented to the construction of said tracks and the purchase of such land; that this affiant verily believed that the map referred to by Charles H. Middleton in his deposition taken in this cause, on the 3d day of November, 1890, and marked 'Exhibit No. 3,' is a blue print copy of the map so exhibited as aforesaid by said Smith to said Cable."

Smiths dep. Rec., p. 837, fol. 2440.

Mr. Smith testifies that he is "absolutely certain" that he never asked Mr. Cable "to consent that the Bailey tract should be purchased and the cost added to the valuation," but "we did discuss the purchase of that and the propriety of purchasing other adjacent lands, but I never invited him to consent to the purchase of these grounds for the joint use of these two companies"; that "I am absolutely certain that I did not present such a map to Mr. Cable, and that we did discuss the purchase of it, and that we did discuss the use of it for breaking-up grounds, but it was presented as one scheme, which was in connection with other schemes. It was a mere matter of information, and I know very well that I did not invite him to consent to purchase it," * * * "the Bailey grounds—because by using the grounds for tracks, as was suggested by myself and others at the time, that it would destroy a portion of our Burnham shop

—Rec., p. 838, fols. 2441-2443.

SHOPS AT BURNHAM.

Proposed yard:

grounds which was required for the additional facilities that we hoped to be authorized to put in in a very short time, and the scheme was abandoned, as I stated yesterday. We have been talking upon the question further, as to locating the breaking-up yards at a point south of Burnham, and located on both sides of the Fort Worth and Santa Fé crossings parallel with our right of way"; that "I did not say that" Mr. Cable stated that that "would spoil our shop grounds," but that he (Mr. Smith) so stated to "Mr. Cable and others: that he so stated to Mr. Cable when he (Mr. Smith) exhibited this plan" to him—"he was present, and I stated it to him particularly."

Smiths dep. Rec., pp. 796, 797, fols. 2,278–2,285.

His attention had been called to the matter in an earlier part of his examination. He then stated that he did not know whether he had ever exhibited the map to Mr. Cable: "possibly I might have done so"; that he never asked Mr. Cable "if the Rock Island would join in a contract for capitalizing the purchase of that property"; that the map was a scheme devised in the engineer's office, and was rejected because it would interfere with the shop grounds.

Then follows questions and answers:

"Q. Now, are you certain that you never asked Mr. Cable if the Rock Island Company would consent to the capitalization of the cost of the Bailey tract if you would acquire it and carry out the plan of yard shown by the map which I have last exhibited to you? A. I will say, I have no recollection of ever saying it.

Q. Will you say you didn't say it? A. I say that I don't believe I ever did. I will say this, that I have always wanted to acquire that property for the Denver and Rio Grande myself. I have always been in favor of that, and have recommended it numerous times but it was for the purpose of using it for the extension of our shops and shop facilities."

* * * * *

When his attention was called to Mr. Cable's testimony he again asserted that he was positive that he made no such proposition to him, 'because in the first place I

knew I never had any such idea in my mind; and if I had I could not have carried it out; I was not authorized.'" He testified further that he had made application for authority to purchase this Bailey land, but that action had been deferred; that he did not assign to Mr. Cable as a reason for not executing the plan that one of the owners was *non compos* and could not make a good title.

SHOPS AT BURNHAM, *Proposed yard.*

On the 26th day of June, 1889, the Denver Company filed in the office of the assessor for Arapahoe county its return of property owned and situated in that county, subject to assessment by the county authorities. This return was verified by its "land and tax agent," under date of June 25, 1889, showing that "the lots and lands herein described as pertaining to the right of way are duly included in the mileage of the right of way and sidings returned by said company to the State Board of Equalization of said State of Colorado." An examination of the list "H, H, H" shows that all of the sixteen and one-half acres, conveyed by Clark and Hotchkiss, described in the return under the name of "Burnham," was reported as right of way and sidings. All of the Middaugh and Bartells tracts were so returned. Of the Bailey tract eight acres were so returned. The list "A, A, A" shows that the Hamer or Homer tract, marked on the map "Burlingame tract," consisted of six and one-half acres, of which three and twenty-three one-hundredths were returned as "right of way and sidings." The list "D, D, D" shows that the west 100 feet and south 165 feet of the east half of block 26, all of block 27, lots 11 to 24 of block 42, Lots 1 to 10 and 31 to 38 of block 43, all of block 44, and out-lot 11, in Hunt's Addition, were returned as "right of way and sidings." It is stipulated that the return for 1887, 1888 and 1889, above referred to, were made by the Denver and Rio Grande Railroad Company by its land fund commissioner and tax agent, to the assessor of Arapahoe county for the purpose of taxation."

Returns for taxation.

Schedule.

Rec., p. 958c.

Under the contract, the complainant was liable to the

SHOPS AT BURNHAM.
Returns for taxation.
Contract Art II, Sec 2, cl. 7.
Rec., p. 15.
Stipulation, Rec., p. 1154, fol. 870.

defendant for one-half of all taxes levied upon property so returned. Such payment was made for one year, 1888. No payments have since been made because of unsettled disputes between the parties as to the accounts in which they are embraced.

Coach tracks.
Smiths dep.
Rec., p. 759, fols. 2140, 2141.

When the St. Joseph Company commenced to operate its trains over the Denver line, an arrangement was made under which the Denver Company handled its equipments and traffic in the yards at Denver and Pueblo, and cleaned its passenger coaches at both places. A portion of this cleaning was done on what were termed the "coach tracks," located near the "paint shops," west of the "off-hand line," drawn by Mr. Smith.

These tracks were used for standing and cleaning the coaches of both companies used in the operation of the line. After the complainant entered into the use and occupation of the demised line, what is known as a Wye track was constructed by the Denver Company for turning the trains of both companies; and by agreement, the cost of construction was put into the valuation upon which interest has been paid by the Rock Island Company; but with the understanding that it should not conflict with the claims of the defendant as to the effect of the exception in article 1, section 1, of the contract. The defendant insists that it was put in temporarily with the intention that it should be taken up to carry out improvements contemplated on the Burnham grounds. It was constructed on the twenty-acre tract known as the Bailey tract, a portion of which was used for the storage of scrap and material out of date, old engines and condemned cars.

—Rec., pp. 765, 766 fols. 2162 2166.

The defendant rendered bills not only for services, but for the use of the coach and Wye tracks, with the claim that they formed a part of the "shops at Burnham." The defendant refused payment of these items, on the ground that they formed a part of the demised property.

—Rec., p. 765, fol. 2163.
—Rec., p. 809, fol. 2332.
—Rec., p. 812, fol 2342.

It also refused to permit the use of any tracks at Burnham by the Rock Island Company for cleaning coaches,

—Rec., p. 759, fols. 2139, 2140.

and assigned as a reason that they were a part of the excepted property—shops at Burnham.

SHOPS AT BURNHAM.
Opinion of Experts.

A large amount of testimony by experts, as to the meaning of the word "shops," is in the record. The defendant, for the purpose of showing that the word covered all property acquired and held for either present or future shop uses, produced and examined John J. Burns, its superintendent of transportation, Alexander Campbell, division superintendent of the Burlington and Missouri River Railroad Company, Orrin A. Derby, division superintendent, Missouri Pacific Railway Company, William A. Deuel, division superintendent for defendant, David Hawksworth, superintendent of motive power, Burlington and Missouri River Railway Company; Arthur T. Palmer, superintendent Kansas division of the Union Pacific Railway Company; Harrison D. Pike, secretary of defendant's general manager; Nathaniel W. Sample, machinery superintendent for the defendant, and S. T. Smith, its general manager.

The complainant examined in rebuttal, W. I. Allen, its assistant general manager; A. G. Amsden, division supintendent, Michigan Southern and Lake Shore Railway Company; George H. Boynton, civil engineer in the employment of the complainant; Charles Dunlap, general superintendent for complainant; R. J. Duncan, superintendent of the Colorado division of the Union Pacific railway; John McCormick, for twenty-five years employed in railway service, but not employed when his testimony was taken; C. F. Meek, general manager for one of the divisions of the Union Pacific Railway; H. Monkhouse, an employe of complainant, with over thirty years experience in the mechanical departments of several railways; Benjamin Thomas, vice-president and general manager of the Chicago and Western Indiana Railway Company and of the Belt Line of Chicago; Charles C. Wheeler, for thirty-six years engaged in the railway service in different positions between and including station laborer and general manager—retired when his testimony

SHOPS AT BURNHAM.

Opinion of Experts.

was taken; and George F. Wilson, for twenty-nine years employed in the mechanical departments of different railway companies, and, when he testified, so employed by the complainant.

Burn's dep. Rec. p. 545, fol. 1,354; Campbell's dep., Rec., p. 681, fol. 1,841. *Derby's dep.*, Rec., p. 712, fols. 1,959, 1,960. *Hawksworth's dep.*, Rec., p. 650, fols. 1,718, 1719. *Sample's dep.*, Rec., p. 724, fol. 2,004. *Allen's dep.*, Rec., p. 918, fols. 138, 139. *Amsden's dep.* Rec., p. 992, fol. 121. *Boynton's afft.*, Rec., p. 927, fol. 172. *Dunlap's afft.*, Rec., p. 920. *Duncan's afft.*, Rec., p. 912, fol. 115. *McCormick's afft.*, Rec., p. 914, fols. 122, 123. *Meek's afft.*, Rec., p. 910, fol. 110. *Monkhouse's afft.*, Rec., p. 923, fols. 155-166. *Thomas' dep.*, Rec., p. 1013, fols. 195 196. *Wheeler's dep.*, Rec., p. 959, fol. 2. *Wilson's dep.*, Rec., p. 924, fols. 160, 161.

In the examination in chief, or the cross-examination of each witness, the term "railroad shops" was defined. The following definition was approved by Burns, Campbell, Derby, Hawksworth, Sample, Smith, Allen, Amsden, Boynton, Dunlap, Duncan, McCormick, Meek Monkhouse, Thomas, Wheeler and Wilson:

"*The buildings, structures and tracks used exclusively in the manufacture and repair of equipment and appliances used in the construction and operation of railroads.*"

Certain witnesses also testified:

Allen's afft. Rec., p. 918, fol. 139. *Amsden's dep.* Rec., pp. 993, 994; fol. 121 -- 128. *Boynton's afft.* Rec., p. 927, fol. 172. *Dunlap's* afft. Rec., p. 920, fol. 115. *McCormick's afft.* Rec., p. 914 fol. 123. *Monkhouse's afft.* Rec., p. 923, fols. 156, 157. *Thomas' dep.* Rec., p. 1,013, fol. 195. *Wheeler's dep.* Rec., p. 960, fols. 3 and 4. Wilson's afft. Rec., p. 924, fol. 161.

Mr. Allen, that the shops "do not include any track or structures used in the operation of a railroad for occasional use for the purpose of repairs or in connection with the shops of the company; neither do they include any lands owned by the company upon which no structures whatever have been placed, though the same be available for and may be held with the intention to use the same for shop purposes at some future time"; and his statement in this regard is in accord with those made by Mr. Amsden, Mr. Boynton, Mr. Dunlap, Mr. Monkhouse, Mr. Thomas, Mr. Wheeler and Mr. Wilson.

Further:

Allen's afft. Rec. p. 918, fol. 140.

"that tracks upon which passenger and equipment is placed to be cleaned in the operation of a railroad are not shop tracks, and form no part of the shops of the company; that it is within the observation of affiant upon many roads, that such tracks are located at great distance from such shops, and are located solely with a view to the convenience of the employes performing such cleaning, and the mere fact that a track used for cleaning cars, or for any purpose other than for exclusive use for the manufacture or repair of railroad equipment, does not constitute shops, tracks, or a part of the shops."

SHOPS AT BURNHAM.

Mr. Amden, that such tracks belong to the passenger or coach yard and are a part of the operating department; that a storehouse for shop material is a part of the shops; if for train supplies it would not pass by the description "shops"; that the round house and "good order car track" would not pass as covered by that word, and that "shop grounds" are not included in the word "shops."

Amden's dep., Rec., pp. 993, 994, fol. 122-128.

Opinion of Experts.

Mr. Boynton, that the word "shops" does not cover "grounds adjacent to such shops, or structures not used exclusively in the manufacture or repair of such appliances," and that it "does not apply to round-houses, water-tanks, ice-houses, nor is the term applicable to a track used as a Wye for turning engines and trains."

Boynton's Affl. Rec., p. 927, fol. 172.

Mr. Dunlap, that the word

—"does not include tracks that are used for the cleaning of passenger coaches, in the operation of the yard, or for moving general stores to and from the storehouse of the company; that it does not include vacant lots lying near to the shops upon which there are no structures or tracks for shop purposes, even though such land may be acquired for and are held by the company with a view to placing shops and structures thereon at some future day; that such lands are properly denominated shop grounds, but that there is a difference between shops and shop grounds upon which no shops or shop structures have been erected; that the location of a track with regard to the shops does not define its character; but that its character is defined by the use to which it is applied; that a track used in the operation of a railroad, whether it be a main or yard track, is an operating track, while a track used exclusively in the manufacture and repair of railroad equipments and appliances, is a shop track, wherever it may be located."

Dunlap's Affl. Rec., p. 920, fol2. 143-147.

He states further, that

"It is generally understood among railroad operators that the authority of a master mechanic ends at the turn-table; that after an engine passes over the turn-table on to the operating tracks, the authority of the master mechanic ceases and that of the superintendent attaches."

Monkhouse's Affl. Rec., p. 923, fols. 156-158.

Mr. Monkhouse testified to the same effect.

Mr. McCormick, that the word "shops"

McCormick's Affl. Rec., p. 916.

—"does not include round-houses, ice-houses, water-

SHOPS AT BURNHAM.

tanks, coal-chutes, and tracks used for cleaning cars * * * or a Wye track used for turning engines, cars and trains in the operation of the railway."

Opinions of experts, Thomas' dep. Rec., p. 1,013, fols. 196, 197.

Mr. Thomas, that there is a difference between "shops" and "shop grounds," and that tracks on the shop grounds may be used for operating as well as shop purposes.

Wheeler's dep. Rec., p. 961, fols. 3-5.

Mr. Wheeler distinguished between "shops" and "shop grounds," and stated that cleaning tracks are operating tracks, and that the cleaning of passenger coaches belongs to the operating department.

Mr. Wilson, that the word "shops" does

Wilson's aff't. Rec., pp. 924, 925, fols. 161-163.

—"not include tracks that are used in both the operating and mechanical departments; neither does it include the tracks that are set apart for the accommodation of the storehouses of the company, nor for the cleaning of passenger equipment; that he has knowledge of many cleaning tracks so-called—which are located at places remote from any shops of the company, * * * that a cleaning track, or a track constructed and operated for the convenience of the storehouse of the company is not constituted a shop track from the fact that it is located near to shops."

He states further:

—"that the authority of the master mechanic in charge of the railroad shops varies in different companies, but the rule which has generally obtained in his observation, limits such authority to buildings, structures and tracks used in the manufacture and repair of equipment and appliances as above stated, and it never extends over any tracks that are used in the operation of the line, including the operating yards."

Burns' dep. Rec., pp. 544, 545, fol. 1,334, *et seq.*

Mr. Burns, that the uses of railroad shops are "for repairs of locomotives, repairs of cars, in various cases for wholly building cars and engines, for the care of coaches, repairs of cars and in general railroad work," that is, "general manufacturing of articles used on the railroad"; that, in other words, they are shops used for

—Rec., p. 529, fols. 1,271, 1,272.

the manufacture of railroad appliances and equipments, or for the repairing of the same"; that "railroad shops in railroad parlance" include the round-houses, that is, the engine houses, the machine shops, boiler shops, black-

SHOPS AT BURNHAM.
Opinions of experts.

smith shops, storehouses, paint shops, carpenter shops, wood-working shops, oil-house, ice-house and ice-houses, and scrap tracks and yard tracks for holding engines and cars for repairs, all switches, sidings and tracks adjacent to the shops on the shop grounds;" and he illustrated the use of the structures which constitute the shops as follows:

Burns' dep. Rec. p. 575, fol. 1273.

"In the usual work at shops, such as building, rebuilding or repairing locomotives or cars, the various parts needed to repair these locomotives and cars are manufactured in different buildings. The supplies are taken from the storehouse, the forging and frame-work for the engines from the blacksmith shop, the brasses from the brass foundry, tin work from the tin shop, wheels and axles from the supply yard. All these and various other articles that I have mentioned are moved from the places from which the work is done upon them and congregated in the erecting shop or in the car shop in the case of the erection of a car. These are carried back and forth through these yards on push cars or on regular freight cars."

Further, in answer to the question: "What grounds and tracks are included in the shops at Burnham?": —Rec., p. 530, fol. 1274.

"All the tracks south of 13th avenue down to the connection of the sidings with the main track below the ice house. That would be south of the south connection of the present Wye with the sidings"—

—and that they "are all used for shop purposes and are under the control of the superintendent of machinery."

As to the location of the eastern boundary of the Burnham shops Mr. Burns testified: Burns' dep. Rec., pp. 553-558, fols. 1375-1384.

"Q. Where is the eastern boundary? A. The eastern boundary would be the track, the first track in front of the superintendent of machinery's office, not including three or four side-tracks between that and the main track.

Q. Well, these three or four side-tracks between that and the main track in the shop grounds, are they, on the outside, and what are they used for? A. They are used for storing freight cars and I do consider them on the outside.

Q. Outside the shop grounds? A. I consider them so. They are now used as a breaking-up yard.

* * * * *

SHOPS AT BURNHAM.

Q. Where was the eastern boundary of the shops when that contract was made? A. I should say the track in front of the superintendent of machinery's office.

Q. Was the track there then? A. It was there then.

Q. What was it used for? A. For moving engines to and from the round-house.

Burns' dep. Rec. p. 653 *et seq.*

Q. And did they pass into the jurisdiction of the master mechanic or his subordinates before they got to the round-house? A. They did. They passed into the jurisdiction of the master mechanic's employes at the Union Depot.

Q. What was the next track east of that, February 15th, 1888? A. The main track.

Q. What tracks have been constructed since between the two? A. Three or four side tracks.

Q. And these are not in the yard, you think? A. I should say that they were not in the yard because they are used for road purposes.

* * * * *

Q. The eastern boundary is shown by the map—the eastern boundary of the shop grounds? A. Yes, sir.

Q. How is it shown; what kind of a line? A. If it is a blue print, it would be a white line.

Q. How many white lines are there east of these grounds? A. There would be facing in front of the superintendent of machinery's office, there would be two main tracks and three sidings, and this track that is used for passing the engines back and fro.

Q. How many white lines would that make? A. About five.

* * * * *

Q. Can any man say by looking at the map, with five lines running parallel, that one of these white lines is a boundary line and can he tell which one is the boundary? A. The first track outside of the shop grounds.

* * * * *

Q. Is there on any map you have ever seen any line drawn for the purpose of showing the eastern boundary of that yard? A. I believe that this track—the track on which the engines are moved to and fro from the round house and to the coal chute is the eastern boundary of the shop grounds.

Q. Are those lines on the map drawn to show the location of that track or to show the boundary line?

A. The location of the track.

Q. Just as there are other white lines on the same map to show the location of other tracks? A. Yes, sir."

SHOPS AT BURNHAM.
Opinion of experts.

To the question: "What would he look for if sent to the ground of the Northern Pacific Company to look for its shops?" he answered:

Burns' dep. Rec., p. 543, fol. 1326.

"I would look for engine-houses, machine shops, car-shops and attachments, blacksmith shops, ice house, store-houses and the adjacent tracks necessary for the transaction of shop business."

That having "found these he would conclude that he had found the shops of the company at that place;" that the tracks "necessary for the transaction of a shop business" and "the tracks for storing the cars for repairs, handling engines, storing scrap, tracks in the lumber-yard and tracks connecting one shop with another to make it convenient to move material;" that having found these he would assume that he had "found all the tracks that form a part of the shops" unless "there were regular shop grounds known by bounds purchased for shop purposes and known as shop grounds and designated as such;" that with the word "shops" only to indicate the property he would include the "grounds that were necessary for storing scrap, old material, lumber and storing new material to be used"—grounds so used or intended to be so used; that if the grounds were not fenced he would include "reasonable grounds" * * * "say ten or fifteen acres;" that if the grounds were fenced and were so located that they could be used equally well for shop or operating tracks he would call it "shop grounds or shops."

—Rec., p. 543, fol. 1327.

—Rec., p. 544, fols. 1330-1333.

Mr. Burns thinks that the cleaning of coaches is a part of the operation of a railway, and the tracks used for such purposes are used in the operation of the railway.

—Rec., p. 554, fol. 1368, *et seq.*

Campbell's dep. p. 670. —671, fols. 1801-1808.

Mr. Campbell, in chief, that the shops consist of "all the yard and grounds surrounding it. Of course you know that ground is considered shops that is not covered by tracks or buildings. I mean to say a piece of ground that is away from it"; further, that in his judgment the entire body of land at Burnham was covered by the term "shops;" that as a rule cars were cleaned and

SHOPS AT BURNHAM.

supplied at the shops; that the supplies usually furnished at such shops were oil for lamps, water and ice, and that fifty to one hundred acres would be reasonable shop grounds at Burnham. On cross-examination, that he embraced in his definition "any amount of vacant land lying near shops, * * * if the owner intends some time or other to use them for shop purposes."

Opinions of Experts.

Campbell's dep. Rec., p. 682, fol. 1843.

Mr. Derby, in chief, that by "shops" "is generally meant to include all shop buildings and the tracks leading to those shops, repair shops, material tracks, and such tracks as are not used in the general yard business for general work;" that when property is situated in the manner assumed in the hypothetical question submitted, and a "lease is given of the property including the shops, it would be his 'opinion' as a railroad man that the land was used for shop purposes."

Derby's dep. Rec., p. 704, fol. 1930.

—Rec., 705, fols. 1931-1933.

"Q. Would the question as to whether or not these grounds were purchased for shop purposes and was known to both parties, and that tracks projected towards the unoccupied ground, affect the question at all as to whether or not the whole would come within the term 'shops'? A. Unless that land was pointed out and was not occupied, I don't know where they would determine where the shops end.

Q. Suppose the ground was pointed out as relating to the shops? A. I should think they were shop grounds if I was so told."

Also that shop grounds and tracks are usually under the control of the superintendent of machinery.

On cross-examination on the same point:

—Rec., p. 713, fols. 1963-1965.

"Q. In regard to the shops, I observe you made a distinction between 'shops' and 'shop grounds'? A. Generally in speaking of shops I would consider ground occupied by the shops, tracks and material as belonging to and appurtenant to the shops.

—Rec., pp. 711, 712, fols. 1957-1959.

Q. Do you mean by that the ground on which the buildings, structures and tracks are actually located? A. Yes, all lumber or other material.

Q. And it must be actually occupied to form a part of the shops? A. It must be used in connection with the shops.

Q. If you should see railroad shops—the different

buildings that constitute railroad shops and tracks running from one to another and things usually located about such shops, would you say that those buildings and the grounds on which they stood, constituted the shops of the company? A. Yes, sir; the buildings, ground and track.

SHOPS AT BURNHAM.

Opinions of Experts.

Q. Supposing on one side the shops covered ten acres, and on one side you find twenty acres upon which there is no structure whatever, and on the other side there are fifteen on which there is located a building which constitutes a part of the shops; would you say that land constitutes shops or shop grounds? A. If I saw it in that position I would not know who it belonged to.

Q. You would not know whether it was a part of the shop or not? A. I would not know who it belonged to.

Q. If your attention was called to thirty or forty acres remote from any station and was advised that a railroad company had got that land for the purpose of erecting shops upon it some time? A. I would call it shop ground.

Q. Then the shop portion would be simply the buildings, structures and track and the ground they occupied? A. I should say so."

Derby's dep. —Rec., p. 713, fols. 1963-1968.

Further, that the plat of the proposed yard produced by Middleton showed a yard to be used in the operation of the railway.

Mr. Deuel, on his examination in chief,

—"in speaking of shops, we consider anything in connection with the operation of the shops, connected with them; all tracks, the round-house, turn-tables, coach yards, etc., and the repair tracks, as shops."

Deuel's dep. Rec., p. 416, fols. 828-830.

Further, that they, the shop tracks, are used for "various purposes: for repair tracks, coach tracks, etc.;" that they are never used "for purposes foreign to shop purposes;" that "they are used exclusively for shop purposes;" that he knows the tracks in connection with Burnham shops and they are used for no "other than shop purposes" * * * "except for supplies that are located on the shop grounds, and for unloading material, storage tracks;" that the coach track referred to in this litigation is a "shop track;" that the Wye track at Burnham was constructed on shop grounds and was temporary in its character.

SHOPS AT BURNHAM.
Tracks west of the "off hand line"

"Q. I wish you to state where, as to the points of the compass, the shop and shop tracks are as to the main tracks? A. The shops are on the west of the main line.

Q. And the shop tracks? A. And the shop tracks, all of them.

Dewel's dep.

Q. I will ask you to state whether or not there are any tracks west of the main tracks at or near Burnham that are not shop tracks? A. Yes, there is.

—Rec., pp. 417, and 448, fols. 833-835.

Q. State what one it is? A. There is three.

Q. State what they are? A. They are used for siding and for making up trains.

Q. Where are they? A. Between the main track and the Burnham offices.

Q. Are there any others? A. No, sir.

—Rec., p. 437, fol. 911.

Q. I will ask you to state whether or not these tracks are used in any respects for any yard business or other business of the defendant company except for the business connected with the shops? A. Leaving out these three tracks and speaking of the shop tracks; they never have been used, except in the past ninety days, on account of a blockaded condition of our road. If I am allowed to correct my testimony a little, I think that there is four tracks; we put in the last thirty days two tracks and I think there is four tracks between the main line and the offices. It is four tracks instead of three."

—Rec., pp. 430, 431, fols. 886-887.

Further, on cross-examination, the "grounds" which "constitute or form a part of the shops at Burnham," consist of "any track that is used in connection with the shops, coach tracks, repair tracks, round-house tracks, ash-pit track, and any tracks too numerous to mention, that form a part of the shops at Burnham;" that some of these tracks are fifteen hundred to two thousand feet long, and some of them "are necessary certainly to the operation of the road. You could not operate the road without them;" that the coach tracks are "as necessary as the shops are;" that they have been used uniformly for that purpose; that the Wye track was built for such use and has been so used by both companies, but it is a part of the shops, because it is on shop grounds.

—Rec., pp. 431, fols. 889, 890.

—Rec., pp. 435, 436, fols. 903-908.

Further, that it was the understanding of the witness, that the shop grounds extended from the south line of the block south of Pine street to the north line of Vasquez

street, and embraced everything west of the main tracks, "because, the programme and scheme is to use all these for shop purposes"—that is, the witness knows that such has been the programme since November, 1888; he was not in the country before that time.

Opinion of experts.

Mr. Hawksworth, on his examination in chief, defined "shops:" "Well, the word 'shops,' of course, would include the 'shops and all repairs tracks, shop-yard and everything pertaining to large shops, the main shops;' that cleaning and repairing are done on the shop grounds, and supplies are furnished there;" that in his judgment forty acres would not be too much for the shop grounds of a railway fifteen hundred or two thousand miles long; that upon the hypothetical statement as to the situation at Burnham, "that would be shop-grounds located in that way;" that in his judgment, the words "including the shops at Burnham," included the shop-grounds.

Hawksworth's dep.
Rec., p. 647, fol. 1,706.
—Rec., p. 648, fol. 1,710.

On his cross-examination, that ice-houses were a part of the shops, though the ice was used exclusively in the operation of the road; that the coal-sheds are used exclusively in the operation of the road and are used in manufacturing or repairing, but are classed as shops because they are located near them; that the tracks into the lumber yard are shop tracks, because they are used in carrying lumber between the shops and yards and not in the operation of the railroad; that all tracks used exclusively for shop purposes are shop tracks; "that the cleaning tracks are shop tracks and under the control of the master mechanic, but on the railway with which he is connected the cars are put on these tracks by the operating employes, cleaned by them and removed by them, sometimes under the orders of the yard-master and sometimes under the orders of the master mechanic."

—Rec., p. 449, fols. 1,715, 1,717.
—Rec., p. 651, fol. 1,722.
—Rec., p. 651, fols. 1,724, 1725.
—Rec., pp. 652, 653, fols. 1,726-1,730.

Mr. Palmer defined the word "shops":

"I would consider it in speaking of the 'shops,' the grounds and tracks necessary for the operation of the

Palmer's dep.
Rec., p. 629, fol. 1,634.

SHOPS AT BURNHAM.

shops; that it would cover that; at least, that is the way I would term it."

Opinions of experts.

To a hypothetical question which assumed that the grounds claimed as a part of the "shops" consisted of thirty-five or forty acres, he answered:

Palmer's dep. Rec., p. 630, fol. 1639.

"As I stated before, I would consider that the grounds and tracks on the grounds that were for shop tracks and shop grounds and the shops, would be what are used, and the tracks usually necessary to running the business of the shops."

—Rec., p. 631, fols. 1643, 1644.

—that "generally speaking I would understand in speaking of the shops that" it would "include the grounds: that when the shops are large, the cleaning is done at the shops by shop employes and supplies are there furnished."

—Rec., p. 640, fol. 1678.

On cross-examination, that all tracks "about the shops and on the shop grounds are usually termed by us 'shop tracks'"; that the cleaning of coaches is a part of the operation of a railway; that the term "shops" applies

—Rec., p. 641, fol. 1682.

to buildings and the tracks actually constructed; "and shop grounds consist of the land on which those structures are placed, and all other land adjacent to it over which the shops could be extended if they ever wanted to extend them."

That all yard tracks are under the control of the master mechanic.

—Rec., p. 641, fol. 1695.

"Q. Does not the authority of the master mechanic commence at the turn-table? A. So far as having charge of a locomotive engineer or fireman, it ceases when they cross the table; then they come under the transportation department, as far as having charge of the engineer or fireman; but in case of the engineer or fireman switching in the yard, then he has charge of them in the shop yard; he can dismiss them and take them off."

Pike's dep. Rec., pp. 465–466, fols. 1023–1025.

Mr. Pike defined the meaning of the word "shops," "in railroad parlance":

"What is meant to be included within the term 'shops' is all the buildings used in connection with the shop purposes, all the tracks leading thereto from where the first lead is taken out of the main track on one end, to a point

where you get into the shops on the other, and all ground adjacent to the shops which is not used for traffic trains, or the handling of traffic cars in regular road operation."

SHOPS AT BURNHAM.

That such tracks are "within the control generally, of the master mechanic", and are never used except in case of emergency in storing traffic cars.

Opinions of Experts.

On cross-examination:

Pike's dep. Rec., p. 502, fol. 1,073.

"Will you please tell us again what the railroad shops at Burnham consist of? A. Everything west of the main track, except two or more side-tracks, immediately adjacent to the main track.

Q. All of the land in the yard west of the main track, except that on which those two tracks are situated—is that the way you want to be understood? A. Yes, sir.

* * * * *

—Rec., pp. 502-504, fols. 1,175-1,180.

Q. What is there now on the land south of the Wye that would indicate that that was a part of the Burnham shops—shops at Burnham? A. No structures that I know of.

Q. Well, what else is there that would indicate to a stranger who went there to look at those premises that that land was a part of the shops at Burnham? A. The mere fact that that land lies immediately south of the main shop buildings and in such a way that it could not be utilized for other purposes half as well as it could for shop purposes and their natural growth.

Q. The shops at Burnham embrace all land near there which could be used more conveniently for shop purposes than for any other purposes? A. That is about what I mean to say.

Q. Isn't there a great deal of land west of the shops that could be more conveniently used for shop purposes than for any other? A. Why, yes.

Q. But there is a great deal north; isn't there? A. As I recollect, not very much north.

Q. Now, did you say that this land on which the Wye is situated, in the condition it was in on the 15th of February, 1888, and the land south thereof to the southern boundary line of the yard, could be more conveniently used as a part of the shops than for other railway purposes? A. Certainly; because for siding, for traffic purposes, other land could be procured, and you could not procure other land for the shops as conveniently situated as that is.

Q. You mean for the future use of the shops? A. I do, sir.

SHOPS AT BURNHAM.

Q. Did everything that could be conveniently used for the shops in the dim future form a part of the shops on the 15th day of February, 1888? A. No, sir; that might be extended to almost any boundary.

Opinions of Experts.

Q. Well; where is the limit under your definition? A. Well, the ground that we owned in that locality at that time and which had been procured for that purpose for years.

Q. Where are those ice-houses? A. They are all, as I remember, about due west of the tail of the wye.

Q. Are they a part of the shops? A. I think not. I do not know. I do not believe that the railroad owned the ice-houses.

Q. Then that land was not used for shop purposes? A. No, sir, not then.

Q. They did own the ground on which they stood? A. I believe so.

Q. How much land lies south of the most southerly shop building in the yard and on the west side of the track? A. I do not know, sir. I perhaps might estimate it at fifteen acres or twenty.

Q. Fifteen or twenty acres. Now, on the 15th of February, 1888, three was not a structure of any character or description on that fifteen or twenty acres that indicated that it formed a part of the shops, was there? A. Not that I remember.

* * * * *

Pike's dep. Rec., p. 505, fol. 1103.

Q. You say that Burnham shops, or to use the exact language of the contract, 'the shops at Burnham,' on the 15th day of February, 1888, not only covered the ground on which the buildings were then actually located, but all of the ground in the vicinity thereof over which shops and structures should at any time in the future be extended? Is that the way you understand it? A. Yes, sir. * * *

Q. You cannot mention a single use to which it can be applied in connection with the shops, and still you swear that that it is part of the Burnham shops, do you? A. I say that I believe that it is a part of the Burnham shops or land, but that the Wye was not, from the time the question of that wye was first considered, or rather, when I first heard of it—I understood it to be temporary in character and have always understood so since.

Rec., pp. 505, 506, fols. 1186-1888.

Q. Now, do I understand you to saying that that wye is a part of the shops at Burnham, because it is located on land from which the shops at Burnham may, at some future date, however remote, may be extended? Is that your process of reasoning? A. No, sir, I did not say that the wye itself is part of the Burnham shops.

SHOPS AT BURNHAM.
Opinions of Experts.

Q. Oh, you do not. What is it? A. It was placed there as a temporary arrangement to turn trains.

Q. But it was no part of the Burnham shops, in your judgment, you know it was not, do you? A. I do not think now that it is.

Q. Has it ever been? A. No, sir."

Sample's dep. Rec., p. 719, fol. 1986.

Mr. Sample, that as superintendent of machinery, he exercises supervision "in a general way" over the "grounds, tracks and buildings that are situated at the shops and used in connection with shop business;" that the north line of Vasquez street, or the south line of the Bailey tract, is the "southern boundary of what has been known as the ground connected with the shops at Burnham;" that the north line of the Burlingame tract is the north boundary; that said ground is "on the west side of the main track;" that his recollection is that the original southern boundary was at Martin street, and the north boundary the southern line of the Burlingame tract; that the Bailey tract was bought in 1881 for "additional grounds, storing material and all that kind of things;" that the northern boundary was the south boundary of the Burlingame tract until 1887, when that tract was bought for additional shop ground; that the property "has remained as the property used for shop grounds from then until now;" that the coach tracks are on the original grounds acquired prior to 1881; that the tracks on the west are used for the storage of extra cars and equipment; that prior to the construction of the Wye track, a portion of the Bailey track was used for the storage of good order cars, the portion occupied by the track which runs near the western boundary thereof; that that track was constructed in 1881, and it has always been used for good order cars coming from the paint shop, that the switching engines took them from that track; that the tracks on the shop grounds "are used in connection with the shops for the repairing the cars and coaches and the storage of those that cannot be gotten at at once—part of them for the storage of bad order cars and part of them for good order cars;" that "so far

—Rec., pp. 720–724, fols. 1898-2003.

SHOPS AT BURNHAM.

Opinions of Expert.

as the work on the tracks is concerned, if there is anything to be done, the superintendent (the witness) has charge;" that "the work is done and cars are set by direction of the division master mechanic or the car foreman;" but the witness "is supposed to have general supervision;" that engineers and switchmen are placed at Burnham to do the work there; that if an engineer should refuse to obey an order on the shop grounds, he would be discharged by the witness; a switchman could be so dealt with for such an offense by the superintendent only; that even the engineer is subject to the order of the switching foreman; that the cleaning of coaches is something very necessary in the operation of a railroad, and is generally done near the shops, because there is more or less work to be done in the shops; "but there are cases where they clean coaches away from the shops, I imagine;" that when passenger trains come in in the evening and go out the next morning, the coaches are stored on the cleaning tracks; that cars are carried from the paint shop down to the good order track on the Bailey tract, when convenient, by gravity, and from that track they are taken by switchmen, assigned to duty at Burnham, to be put in trains. When a car is shoved from the turn-table to the good order track on the Bailey tract, that ends the shop's control over the car; that when a train is placed on the cleaning track it is made up, ready to go out, is cleaned and repaired; "and then when they are ready to go they are pulled out and taken to the Union depot; that if a train was set in on the cleaning track in the forenoon of the day, "not to be moved until 5 o'clock the next morning," and in the meantime another train should come in which would need cleaning, the first train would be set on another track in what is claimed to be shop grounds.

Sample's dep. Rec., p. 725, fol. 2006.

—Rec., p. 427, fol. 2017.

—Rec., p. 728, fols. 2018, 2019.

Smith's dep. Rec., p. 829, fol. 2409.

Mr. Smith, on cross-examination, that the term "shops" covered stores, storehouses, houses for car-cleaners and inspectors and oilers; that "it is considered that the general term 'shops' covers everything connected with the shops under the supervision of the master mechanic or

SHOPS AT BURNHAM.

other officers of the motive department and car departments of any road;" that he had "never had a discussion" on the meaning of the phrase "railroad shops" alone, "but in transacting business with the officials of the road, officers connected with the motive power and car departments, and with the superintendents of the divisions. The limits of the dividing line between the shops and the other portions of the property of the company were well defined, and the officials of the motive power department had under their charge one side of the line, including the shops; and the superintendents, in connection with maintenance and transportation, the other"; that the distinction between "shops" and "shop grounds" would depend upon circumstances; that if a railway company owned a parcel of land three-quarters of a mile long, with shops on one end thereof, the land at the other would be covered by the term shops if it was acquired for shop purposes, and the same would be true of lands four miles away from the shops on which were no structures, if it was acquired for the same uses; that he would call the lands four miles away "shop grounds" instead of "shops."

Opinion of Experts.

Smith's dep. Rec., p. 830, fol. 2313.

—Rec., p. 831, fols. 2416–2418.

Tracks west of off hand line.

—Rec., pp. 741, 742 fols. 2071–2073.

Further:

"Q. Mr. Smith, there has been a good deal of money expended at Burnham and added to the original valuation upon which the Rock Island pays interest, has there not? A. Yes, sir, that is east of the line that I referred to.

Q. What has been the nature of those expenditures and where is the property upon which they have been expended? A. Well, on all of the property south to the second track.

Q. South or east? A. West of the main track, between the office and the main track, west of the main track and east of the office and on the ground this side owned by the company.

Q. By this side do you mean the east side? A. East side where there have been tracks put for siding cars for the industries located along there.

Q. What industries are located upon the east side of the main tracks at Burnham? A. Well, they are principally stone-yards, coal-yards and a sampler.

SHOPS AT BURNHAM.
Opinion of Experts.

Q. You may state whether those industries have built up since the making of this contract in February, 1888? A. Yes, sir, largely, most of them."

Smith's dep. Rec., p. 849, fols. 2482-2485.

He further testified that in the operation of the railway between Denver and Pueblo the cars composing passenger and freight trains of both the Denver and Rock Island companies were stored after arrival and until departure, on tracks inside the shop grounds so-called at Burnham. They are handled by switch-engines and crews of the Denver Company and were under the superintendent of machinery or master mechanic. The engineer is on the shop pay-rolls—the switchmen on the operating rolls.

—Rec., p. 850, fol. 2486.

—Rec., p. 863, fol. 2540.

He rejects the suggestion that the forty acres marked "shop grounds" on the map sent by Ricker to Parker were reserved.

Sample's dep. Rec., p. 675, fol. 1818; p. 686, fol. 1859.

Mr. Sample disclaimed having any knowledge as to what railway employes and officers generally understand by the term "railroad shops," and stated that his testimony set out only his own opinions.

Campbell's dep. Rec., p. 675, fol. 1818; Rec., p. ol. 1859.

Mr. Campbell states that he had never heard any railroad man express or declare what is embraced in the phrase "railroad shops;" that his testimony consists of his own opinion or judgment as to what constitutes "railroad shops"—and nothing more.

II. The exception of other property between and at Denver and Pueblo.

This embraces, 1. Round-houses at Denver and Pueblo, for the construction of which special provision is made; 2. Betterments, improvements and additions which may be constructed at the expense of one party—the other not electing to use them as provided in the contract.

III. As to the use of the premises demised.

Three contentions arise:

1. As to the use of the Denver terminals for traffic

which does not come to or go from defendant's railroad at Colorado Springs. JOINT USE OF DENVER YARD.

2. As to the right of the complainant to use its own motive power and employes in defendant's yards at and between Denver and Pueblo.

3. As to the right to demand absolutely the removal of any employes engaged in the joint operation of the line.

The complainant in its original bill set out the contract, the substance by allegation, and a copy as an exhibit.

Original Bill, Div. II., and XI. Rec., pp. 4 and 8.

It alleges that the Denver Company let the Chicago Company into the "full, equal, joint and perpetual possession and use of all and singular its tracks, buildings, stations, sidings, and switches on and along the line of the railway of said defendant between and including the city of Denver and South Pueblo, excepting the shops of said defendant at Burnham, the meaning and intention of which said agreement in this behalf was declared to be to include all and every portion of the railway of said defendant and all property appurtenant thereto between and at the cities above mentioned, and all improvements and betterments thereof and additions thereto made pursuant to the provisions of the agreement and jointly used by the said, The Chicago, Rock Island and Colorado Railroad Company and the said defendant;" that after it, the complainant, commenced the operation of said demised land it became

Allegations as to arrangements with Union Pacific.

—"apparent that its interests would be advanced and the public would be better served if its freight and passenger traffic consigned directly to Denver were to be carried from said point of intersection over the line of the Union Pacific Railroad Company directly to Denver, for the reason that the haul of its trains would be reduced thereby about seventy-five miles; that thereupon the complainant made a trackage agreement with the Union Pacific Railway Company and thereafter in the conduct of its business over that portion of its said line this complainant caused its through western bound trains at or near said point of intersection to be divided, a part of the Denver traffic being sent directly over said railway of the

JOINT USE OF DENVER YARD.

Union Pacific Railway Company from said point of intersection, and the balance thereof, and the Colorado Springs and Pueblo traffic being sent over the line of railway of complainant; that a portion of the freight and passenger traffic from said city of Denver for points beyond said point of intersection was carried over the railway of the Union Pacific Railway Company, and that at or near the said point of intersection the trains of complainant from the city of Colorado Springs and the city of Denver, were consolidated, and from that point moved eastward as solid trains; that no local business is done by complainant between Denver and the point of intersection; that the contract between complainant and the said Union Pacific Railway Company secures to complainant only the right to use the track of said company for the movement of its trains in the manner and for the purposes aforesaid; that the trains so used are hauled by locomotives belonging to complainant, are controlled and operated by complainant's train men and are in all respects the trains of complainant and not the trains of said Union Pacific Railway Company; and that for such trains the complainant has used the property of defendant secured to it by said contract and the terminal facilities appurtenant thereto, at the city of Denver, which said property and said terminal facilities and the use thereof, are absolutely necessary to complainant for the successful operation of its trains and conduct of its business."

Complainant's allegations as to arrangements with Union Pacific.

That defendant denied the right of complainant to use such terminal property at Denver in the management of its traffic moved over the tracks of the Union Pacific Railway Company, and threatened to exclude its equipment used in the transportation of such traffic from such tracks and yards.

The prayer was for an injunction restraining the defendant from executing such threat.

Answer.
Rec., p. 45.

The defendant by its answer admits in general terms the execution of said contract and the alleged traffic arrangement between the complainant and the Union Pacific Railway Company for the operation of the trains of the complainant over the tracks of said Union Pacific Company between Denver and Limon, and that:

—"In the conduct of its business over that portion of the said line, the complainant caused its through westward

JOINT USE OF DENVER YARD.

bound trains at or near said point of intersection to be divided, a part of the Denver traffic being sent directly over the said railway of the Union Pacific Railway Company from said point of intersection, and the balance thereof, and the Colorado Springs and Pueblo traffic being sent over the line of railway of complainant;"

Defendant's allegation as to arrangements with Union Pacific.

Alleges

—"that the greater portion, if not all, the traffic west bound destined from Denver was sent over the line of the Union Pacific, and the greater portion, if not all, of the traffic from Denver eastwardly was sent directly over the line of the Union Pacific, and a very small proportion or percentage of it was sent by way of Colorado Springs;"

Answer. p. 45 near bottom.

Answer. Rec., p. 46 near top.

Denies

—"that after entering into possession of the railway of the defendant under said contract, it became or was apparent to the complainant that its interests would be advanced or the public would be better served if in the transaction of its business as a common carrier between Denver and points south, west and north thereof and points on its own and connecting railway it could move and operate over the tracks of the said Union Pacific Railway Company between the points of crossing at Limon as aforesaid and the Union Depot and the tracks of the Denver and Rio Grande Railway Company at Denver, its passenger and freight trains, including engines and cars of all classes or any class;"

Answer. Rec., p. 44.

That

—"the use of the Denver terminals or any part thereof is absolutely or otherwise necessary to the successful operation of the complainant's through line to Denver by way of Limon; but on the contrary thereof the defendant alleges that the complainant has not the right nor does any necessity whatever exist for the operation of said line by way of Limon, but the complainant is under obligations by virtue of the contract of February 15th, 1888, to carry and transport its traffic by way of the defendant's line through Colorado Springs to and from Denver, and that it could transact all its business as a common carrier in that way, to serve the traveling public as well, and at the same time carry out the contract obligations imposed upon it by its acceptance of the terms and provisions of the contract of February 15th, 1888."

Answer. Rec., p. 45.

JOINT USE OF DENVER YARD.

Defendant's allegations as to arrangements with Union Pacific.

Answer. Rec., p. 46.

By said answer it further alleges

—"that the said trackage agreement was made with the Union Pacific Railway Company in disregard of the contract obligations of the complainant to send its traffic to Denver by way of Colorado Springs and for the purpose of advancing the interests of the complainant alone in acquiring the use of the Denver terminals of the defendant company without making any just or adequate compensation therefor, and for the purpose of enabling it to falsely pretend and insist that under the said articles of agreement of February 15th, 1888, it had the right to use the Denver terminals for that traffic, making no other compensation therefor than that to be fixed upon the wheelage basis provided in said contract."

These admissions, denials and allegations were substantially repeated in the cross-bill filed by the defendant at the same time, in which it prayed:

Cross-bill. Rec., pp. 63, 64.

—"that the complainant be by the mandatory order of this honorable court required to transport all its cars, engines, trains and traffic to and from Denver by way of defendant's line, by way of Colorado Springs.

The complainant's application for a temporary injunction was heard before Mr. Justice MILLER, of the Supreme court of the United States, and the Hon. MOSES HALLETT, Judge of the District court of the United States for the District of Colorado, and the writ was issued upon the order of Mr. Justice MILLER, Judge HALLETT dissenting.

The complainant again amended its original bill and filed a supplemental bill, after which the defendant filed an amended answer to the original bill, the two amendments which had been made thereto and the supplemental bill. In this amended answer the defendant, covering the allegation of the original bill as to the rights granted, alleged that it

Amended answer. Div. IV. Rec., p. 113

—"among other things covenanted, promised and agreed to and with the Chicago, Rock Island and Colorado Railway Company to let the said The Chicago, Rock Island and Colorado Railway Company into the full, equal, joint and perpetual possession and use of its tracks, buildings, stations, sidings and switches on and along its line of railway between and including Denver and South Pueblo,

JOINT USE OF YARDS AT DENVER.

excluding its shops at Burnham, meaning and intending thereby to include in the description aforesaid all and singular every portion of its railway and appurtenant property between and at the points aforesaid, and all improvements and betterments thereof and additions thereto which might be jointly used by the parties to said contract, as therein provided: but the defendant alleges that the rights so granted to the Chicago, Rock Island and Colorado Railway Company were subject to divers limitations and restrictions, in said contract set forth, and as by the same will more fully appear;"

And

—"that it was the purpose and intent, and the true meaning and construction of said contract was, and is, that the equal joint use with the defendant of the yards, switches, tracks and other appliances in and about defendant's Denver terminals was let to the Chicago, Rock Island and Colorado Railroad Company for use exclusively in connection with trains and traffic of said company brought into and taken from said city of Denver by way of the line of the railway in said contract described, and not for any engines, trains, cars, traffic—freight or passenger—brought into or taken from the said city of Denver by any other road or line than the one therein described and let to the said The Chicago, Rock Island and Colorado Railway Company."

Also

Amended Answer, Div. VI. Rec., p. 116.

—"that one of, and the principal one, of the considerations for granting unto said The Chicago, Rock Island and Colorado Railway Company, the joint use of the property described in said contract, was that the interests of the defendant and of the public could be promoted by the establishment and operation of a through line of railway between all the points on the line of the Denver Company between and including Denver and South Pueblo, and all points on the line which would be operated by the said The Chicago, Rock Island and Colorado Railway Company, and on the system of railways of which the said The Chicago, Rock Island and Colorado Railway Company would form a part, and but for such consideration so expressed in the preamble to said contract, dated February 15, 1888, the said defendant would not have entered into said contract;"

That but for such covenant

—"there would have been no authority in law upon the

JOINT USE OF THE DENVER YARD

Defendant's allegations as to "possession and use."

part of the defendant to grant the rights and privileges conveyed by said contract, and no authority in law upon the part of the said the Chicago, Rock Island and Colorado Railway Company to accept and receive the same;"

That

Amended Answer, Div. VIII. Rec., p. 118.

—"the use by the complainant of the Denver terminals of the defendant company for its traffic brought to or taken from Denver by way of the Union Pacific railroad is a false and fraudulent pretense made by the said complainant for the sole purpose of obtaining the use of defendant's Denver terminals without making any compensation therefor, and for the further purpose of evading the laws of the State of Colorado in that behalf enacted."

And that

Amended Answer, Div. VIII. Rec., p. 118.

—"the said pretended arrangement between the complainant and the Union Pacific Railway Company for trackage from Limon to Denver was and is void and inoperative in law, because the said complainant was not then, nor is it now, organized or existing under the laws of this state or under the laws of an adjoining state or territory, and because the said line from Limon to Denver was and is a competing parallel line with the line of the complainant company to and from Denver to the Missouri river by way of Colorado Springs."

Defendant's allegation as to election, etc.

The amended answer repeats substantially the matters set out in the first answer filed and in addition alleges that

Amended Answer, Div. IX. Rec., pp. 119, 120.

—"at the time of entering into said contract and during the negotiations preliminary thereto, the said. The Chicago, Rock Island and Colorado Railway Company and the parties promoting the same, were considering the question of building its railway direct from the western boundary of the State of Kansas through Eastern Colorado to the city of Denver on the one hand, or of building directly to the city of Colorado Springs on the other hand, and thence coming to the city of Denver over the tracks of this defendant; and that by the provision in said contract expressed that said The Chicago, Rock Island and Colorado Railway Company should on or before the first day of April, 1888, notify the Denver Company (this defendant) whether or not it elected to build its said line to Colorado Springs, and that, if it should not so elect, that then said contract should be null and void—was meant and intended that said Chicago Company should elect as between said two routes, and that said contract should become effectual and operative only upon

the selection of said route via Colorado Springs, to the exclusion of said route direct from the western boundary of the State of Kansas to the city of Denver;" JOINT USE OF THE DENVER YARD.

That the Chicago Company

—"thereby became bound to occupy the line of the defendant company via Colorado Springs under said contract, and to occupy the same with all of its business to and from the city of Denver, to the exclusion of any other route to or from said city;" *Amended Answer Div. X.* Rec., p. 120.

That

—"the said Chicago Company was admitted to the equal use of said property as an entirety and that the same was to be used for the purpose of establishing and operating a through line of railway via Colorado Springs between all points on the line of the railway of the defendant company between and including Denver and South Pueblo, and all points on the line of railway which was intended to be operated by the Chicago, Rock Island and Colorado Railway Company and the system of railways of which it was then intended to form a part;" *Amended Answer, Div. X.* Rec., p. 121.

That

—"the joint use made by the Chicago Company and its lawful successor in interest between Denver and Colorado Springs, should be increased by the addition thereto of all the traffic carried by the complainant by way of the Union Pacific line, and that if such traffic were brought by way of the defendant's line from Colorado Springs the wheelage over the line from Colorado Springs to Denver and Denver to Colorado Springs, would entitle the defendant to receive a much greater compensation for the use of said Denver terminals and the expense of maintaining and operating the same, than it now does, and that such diversion of traffic from the defendant's line from Colorado Springs to Denver to the Union Pacific Railway from Limon to Denver, works a great injury and hardship upon the defendant, in that it compels the defendant to maintain and operate the said Denver terminals at great expense for the accommodation of the complainant's traffic brought by the way of the Union Pacific line, for which it has not and will not receive any compensation, if the complainant's contention herein be upheld;" *Amended Answer, Div. XVI.* Rec., p. 125.

* * * * *

"That such terminal facilities as are now constructed were intended for and are adapted to only such business as

JOINT USE OF THE DENVER YARD.

shall come and go over the main tracks of the defendant including the main tracks between Denver and Pueblo, and that the crowding of said terminals at Denver with business brought by the complainant over the Union Pacific tracks, or by bringing upon said terminals cars from divers connecting tracks, works irreparable injury to this defendant in the transaction of its business, by crowding said yards to the exclusion of the cars of this defendant brought over defendant's main tracks; and that the injury to the defendant's business by reason of so loading said terminals with cars from outside lines cannot be estimated in damages and is irreparable in its character."

Amended Answer, Div. XXI. Rec., p. 136.

Amended Answer, Rec., p. 131.

By the amended answer it is admited that defendant has refused to consent "to the employment of separate switchmen and other yard employes by complainant" in the yard at Denver, for the reason that "it would result in danger to life and property," and "would seriously embarrass the proper administration of the tracks of the defendant," that—

—"at the time of entering into said contract * * * it was distinctly understood by the parties thereto, that this defendant would employ all persons who should be engaged in the joint service of the two companies, including switchmen and other yard employes, and that all such joint employes should be borne on the pay-rolls of defendant company, subject to the right of the Chicago Company or its lawful successor in interest, to demand the discharge of any such joint employe."

Amended Answer, Div. XXIII. Rec. p. 137.

The amended answer also denies that the coach track mentioned was covered either by the contract of February 15, 1888, or by the valuation therein made, and alleges:

—"that by the term 'shops at Burnham,' which by the provisions of said contract of February 15, 1888, were especially excluded from the operation thereof, was meant and intended, and at the time was well understood by the parties to said contract to mean, the buildings, ground, tracks and all facilities appurtenant to the premises which the defendant company then used for the construction, repair, cleansing and supplying of its engines, cars and trains, with certain adjacent land then reserved for like purposes, and was distinctly understood and agreed that the said 'shops at Burnham' included all of the land of the defendant company lying west of the de-

fendant's west main track and south of Twelfth avenue, in the city of Denver, together with all buildings, tracks, structures, fixtures, appliances and appurtenances thereon situated; that no part of said premises was included in the valuation of the three million dollars in the said contract set forth and that the value of no part of the same has ever been included in the capital sum on which the Chicago Company or complainant has paid interest."

JOINT USE OF DENVER YARD.

* * * * *

"And this defendant further alleges that at the time of negotiations resulting in the said contract of February 15, 1888, the subject of the use of the shops at Burnham, and property appurtenant thereto was considered between the parties to said contract and the promoters of the said Chicago Company on the one part and of the officers of the defendant company on the other; and it was at that time stated and distinctly understood by the parties, that the complainant was not by said contract to acquire any facilities at Burnham to be used for the purpose of repairing or cleaning its cars; and it was then contemplated and agreed by said parties that the complainant would either employ the defendant with the facilities it possessed, to perform said work for the Chicago Company upon such terms as should be agreed upon by the officers of the respective companies, or that in the event of failure so to do the said Chicago Company would build or otherwise acquire its own separate facilities therefor, and that in view of such understanding the question as to the care, repair and cleansing of cars was omitted from said contract and forms no part thereof; and thereafter, and after the commencement of the joint operation of the railway property in said contract described, this defendant, as a matter of courtesy, and for the purpose of accommodating the said Chicago Company, suffered and permitted the said Chicago Company and said complainant to have their cars repaired, cared for, cleansed and supplied at its shops at Burnham, rendering reasonable bills therefor; that the Chicago Company has not, nor has the complainant at any time from the date of the execution of the said contract to the present date, given to the defendant any notice whatsoever of its desire for any facilities or conveniencies in the nature of places or buildings or any character of structure at or about Denver or Burnham to be used for the purpose of repairing, cleansing, supplying or otherwise caring for the cars of said Chicago Company or of the said complainant, as provided by section 1, article III of said contract; nor has the said Chicago Company or the said complainant at any time, constructed at Denver or

Amended answer. Rec., pp. 137-139.

JOINT USE OF THE DENVER YARD.

Burnham any such separate facilities or conveniencies for such purpose.

And defendant further alleges that there are situated within the territory established so comprehended within the term 'Burnham shops' and excluded from the granting clause of said contract of February 15, 1888, certain coal-chutes used for the supply of locomotives operating upon defendant's line of railway; that said coal-chutes are situated west of but very near to the west main track of defendant's railway line aforesaid; that at the time of the negotiations immediately preceding and succeeding the execution of said contract, said coal-chutes were the subject of conversation between the general manager of the defendant and the president of the Chicago Company; that in said conversation it was expressly understood and agreed that the said coal-chutes were by the terms of said contract excluded from the said granted premises; that in view of the fact that said coal-chutes were conveniently situated for the purpose of supplying the locomotives of said Chicago Company, and of the complainant as well as of the defendant, with coal, it was, after the execution of said contract, agreed between the said president of the Chicago Company and the general manager of the defendant company, that the use of said coal-chutes should be accorded to the said Chicago Company, and the same have from the time of the commencement of the operation of defendant's line by the said Chicago Company and during the occupation of the same by the complainant been used by the said Chicago Company and the said complainant as a source of supply for fuel for its locomotives; that by reason of such common use of such coal-chutes, and after the execution of the contract hereinabove mentioned, by consent of both parties hereto, the cost of certain extensions and changes in said coal-chutes was added to the principal sum upon which the complainant has been paying interest at the rate of two and one-half per centum per annum; that the cost or value of said coal-chutes, as the same existed at the time of entering into said contract, has never at any time been added to the said valuation upon which said complainant has been paying interest, and that the cost of said extensions and changes has been added by the arrangement between the parties since the execution of the said contract as aforesaid."

Amended answer. DIV. XXV. Rec., p. 140, 151.

In the conclusion of this amended answer it is denied —"that by the terms of the said contract of February 15th, 1888, the complainant is entitled to the full, equal or joint possession or use of said property, or any possession or

use of said property at all with the defendant or otherwise, for its cars, trains, equipment and traffic brought to or taken from the city of Denver by way of the Union Pacific railroad, or that it has any right whatever to any use or possession of the said Denver terminals for any business or traffic taken from or brought to the city of Denver by any other route or line than that of the defendant by way of Colorado Springs."

JOINT USE OF THE DENVER YARD.

Issues were joined by the answer to the amendment to the cross-bill, to which replication was filed by cross-complainants and by replication to the amended answer. The cross-bill and the amendment thereto were subsequently withdrawn.

1. As to the use of the Denver Yards for any traffic which does not pass through Colorado Springs.

(1.) At the time of the making and execution of the contract of February 15, 1888, there was developed or in process of development within a radius of fifty to one hundred miles from Pueblo, Colorado, coal mines and deposits of other minerals or mineral products constituting natural objects of railway transportation. There was also within a like radius of the city of Denver, and other cities on the line of the Denver Railway, developed or in process of development, like deposits of minerals.

TRAFFIC BY WAY OF THE UNION PACIFIC.

Stipulation. Rec., p. 955; tols. 280-282.

(2.) Testimony was taken concerning the alleged election by the Chicago Company to build its railway from the western boundary of the State of Kansas to Colorado Springs, and to abandon the construction of any direct line to Denver.

Alleged election to abandon line to Denver.

Section 10 of article III of the contract provided for a notice to be given by the Chicago Company on or before the 1st day of April, 1888, advising the Denver Company of its election either to build or not to build its line from the western boundary of the state to Colorado Springs. It was further provided that if it elected to build, the roads should be completed on or before the 31st day of December in the same year.

At the meeting of the Board of Directors of the Chi-

TRAFFIC BY WAY OF THE UNION PACIFIC.

Alleged election to abandon line to Denver.

cago Company, held in the city of New York, on the 7th of March, 1888, the day before the last draft of the contract was signed by the officers of both companies, Mr. Cable, in submitting the contract for the action of the Board, said, concerning the plan of the early construction of the road which he had been directed to devise:

Chisholm's Exhibit No. 1. Rec., p. 267, fol. 239.

Rec., pp. 267, 268, fols. 239, 244.

"The railway to be constructed by this company will commence at a point on the western boundary of the State of Kansas, at which it will connect with the Chicago, Kansas and Nebraska Railway. The company by which that road will be constructed has power under the laws of the States of Kansas and Colorado to extend its railway into the last named state, on the line on which this company proposes to construct its railway. It has completed its arrangements for securing the money which will be needed in such construction, and is a party to leases and traffic arrangements which make it a part of the Chicago, Rock Island and Pacific Railway system. Its officers advise me that if 'this company will merge its powers and franchises with those of the Kansas Company, by consolidation, it will construct the road from the initial point at Colorado Springs without delay.' I recommend the favorable consideration of this proposition. If it is adopted the plan of construction which I was instructed to devise will be completed."

Exhibit No. 1. Rec., p. 268, fols. 243, 244.

The board at the same meeting approved the contract, the proposed consolidation, instructed the President "to continue negotiations with regard thereto," also the plan for raising money to build the road, and directed the President to notify the Denver Company that

—"this company will construct its railway from the western boundary of the State of Kansas to a connection with its railway at or near Colorado Springs before the 31st day of December, 1889, and that when its railway is completed to such connections, it will enter upon the joint use of the railway of said Denver and Rio Grande Railway under the contract between that company and this, bearing date the 15th day of February, 1888.

On the 17th day of March, 1889, the Chicago Company notified the Denver Company that it elected

—"as provided by the contract of February 15, 1888, to build its railway from the western boundary of the State of Kansas to Colorado Springs, and that it will

have the same ready for operation on or before the 31st day of December in the year 1889."

Alleged election to abandon line to Denver.

On the second day of May the directors of the Chicago Company convened in Chicago and rescinded a resolution adopted on the 9th of April, establishing a portion of the route of the railway of said company, and adopted another by which the route was established from the eastern boundary of the State of Colorado to the point of intersection with the railway of the Denver Company near Colorado Springs.

Edward O. Wolcott testified that, he had several conversations with R. R. Cable in regard to the proposed contract "during the latter part of 1887 and in the early part of 1888."

Wolcott's affl. Rec., pp. 340, 841, fols. 221-226.

"That among the first of his conversations was one at Colorado Springs, Colorado, in which the subject of terminal facilities at Colorado Springs was discussed; that said Cable stated to affiant then that 'they,' meaning, as affiant supposed and now supposes, to be said Cable and his associates, had not fully determined as to whether the terminus of a road they intended to construct into Colorado to connect at the Kansas line with the Chicago, Kansas and Nebraska Railway Company, should be at Colorado Springs, or not, but that it was thought that such terminus would be at Colorado Springs; and said Cable discussed with affiant generally certain statements which had been made by the leading citizens of Colorado Springs as to facilities which would be extended to the company he represented in the event said company should build to Colorado Springs.

That in all the discussions of said contract the said Cable desired that a clause should be inserted, giving the company which he represented a certain period of time in which to determine whether or not such company would enter into contractual relations with the Denver and Rio Grande Railroad Company. That in their first conversations, and as affiant remembers, in the first draft of the contract which was drawn, the time which should be given to said company in order to determine whether or not it would enter into such contractual relations was fixed at May 1, 1888, and thereafter in the contract as executed, the date was fixed at April 1, 1888. That during the period aforesaid, when the said Cable was in Colorado, there was much public interest in and discussion of

TRAFFIC BY WAY OF THE UNION PACIFIC.

Alleged election to abandon the Denver line.

the proposed line. That affiant remembers that it was rumored that said Cable was negotiating with the Denver, Texas and Fort Worth Railroad Company for the use of its line between Colorado Springs and Denver and Pueblo, and that affiant discussed with the said Cable these rumors, and also discussed with the said Cable the reasonableness of a provision in the proposed contract which should bind the Denver and Rio Grande Railroad Company upon the execution of the contract, but which should leave the other contracting company a certain further period of time within which it should elect whether it would be bound by the proposed contract or not; and that the said Cable assured affiant that he was not entering into or conducting any negotiations whatever with any other company, but that time was required in order that, as Mr. Cable expressed it, 'our folks' or 'our people' could determine whether they desired to build a line from Colorado Springs and from thence reach Denver and Pueblo over the line of the Denver Rio Grande Railroad Company under the proposed contract, or whether they should determine to build an independent line from the Kansas line to Denver, with a branch to Pueblo, in which latter contingency they would not desire to make any contract with the Denver and Rio Grande Railroad Company. Throughout all the interviews which affiant had with Mr. Cable, there was never a suggestion that the people he represented desired or expected to enter into relations with any other company, nor was it ever for a moment pretended or proposed or contemplated that any contract was sought or desired that would give the company represented by Mr. Cable a right to use any terminals at Denver or Pueblo, except for business brought over the line of the Denver and Rio Grande Railroad Company from or to Colorado Springs."

Referring to the changes made by him in revising the articles of incorporation of the Chicago Company, and to the statement of Mr. Cable that he had no authority to make any *material* change, he says:

Wolcott's affl. Rec., p. 942, fol. 231.

—"if the said Cable intends to charge that any act or thing whatsoever was done by affiant respecting the filing of said articles of incorporation, that was not duly authorized by said Cable and acquiesced in by him, and if the said Cable intends to intimate that any act or thing done by affiant in or about the business of said Cable, or the company he represented, was not done by affiant with loyal intention to serve the interests of said

Cable and to carry out his instructions and the instructions of said Withrow in the matter of the preparation of said articles of incorporation—then such charge or intimation is wholly or unqualifiedly false and untrue."

After admitting that he had seen the articles as they were filed, he continued:

Wolcott's affi. Rec., p. 943, fols. 235 and 236.

—"but affiant states that he always understood, and in the conversations with said Cable was always led to believe that if the said contract proposed was entered into, then and in such case, the building of other lines than the line to Colorado Springs would be abandoned."

David H. Moffat, President of the Denver Company, testified that he had several interviews with Mr. Cable:

Moffat's affi. Rec., p. 934, fols. 195, 197, 199.

"That at more than one of said interviews the said Cable stated to affiant, that all he, the said Cable, desired was an equitable contract, which should be fair to both parties, and that no other sort of contract would ever be enforced or carried out. At some of these interviews the terms and conditions to be included in said contract were discussed. That affiant cannot with definiteness state the exact language employed by any of the persons in said interviews, but that on different occasions, and many times, the said Cable told affiant that the new company which he represented would do a very large buisness and extensive business in Colorado, and called his attention to the fact that the revenue which the Denver and Rio Grande Railroad Company would receive therefrom in the way of wheelage would be a large and constantly increasing sum, and would prove a profitable source of revenue to the Denver and Rio Grande Railroad Company in furnishing money for keeping the line of said The Denver and Rio Grande Railroad Company, between Denver and Pueblo, in good repair, and in improving said line. The said Cable in all of said interviews, where the subject was mentioned, uniformly conveyed the impression, by language, to affiant, that whatever business was brought into Colorado, or taken therefrom by the said company, should be brought via Colorado Springs, and that the Company of which affiant was the president would receive revenues therefrom."

Referring to the provision of the contract which required the Chicago Company to give notice by the 1st day of April of its election to build the line to Colorado Springs, the witness said:

TRAFFIC BY WAY OF THE UNION PACIFIC.

Alleged election to abandon line to Denver.

"Affiant states that this clause was inserted in said contract at the request of said Cable, and from the first discussion of the subject of the contract, the said Cable desired that this period of time should be given to the Chicago, Rock Island and Colorado Railroad Company in which to determine whether or not it would enter into the proposed contract. Affiant states that he always supposed, understood and believed, and was always led to understand and believe by the conversations of the said Cable, that this period of time was given in order that the said people building said line might determine whether or not they would build the proposed line to Colorado Springs, the understanding of affiant being that the said Chicago, Rock Island and Colorado Railroad Company had not then determined whether it would build direct to Denver and Pueblo, or whether it would build to Colorado Springs; and it was the understanding of affiant that if the said The Chicago, Rock Island and Colorado Company should determine to build direct to Denver and Pueblo, that then, as a matter of course, the proposed contract would not be entered into."

Smith's dep. Rec., pp. 746, 747, fols. 2,089-2,093.

Mr. S. T. Smith also testified, in chief, to conversations with Mr. Cable, in the presence of Mr. Moffat, while the negotiations were pending. He says that in these conversations, Mr. Cable "merely mentioned an independent line into Denver" without giving "any idea of what particular line"; that "there was not any question in his mind but what this would go by way of Colorado Springs;" that there "was a written notice served of the intention to come in by way of Colorado Springs;" that "they had no idea of building any other road, but they were coming in by way of Colorado Springs; that was the substance of it and about all of it."

He further testified, in speaking of his conversation with Mr. Cable in regard to section 10, Article III:

—Rec., p. 773, fol. 2,194.

"Q. Was that question, as between the two roads, under consideration in this conversation?

(Objected to; the witness is stating conclusions or inferences from conversations.)

Q. (Mr. Wolcott): State it in your own way?

A. Mr. Cable stated in fact that Section 10, Article III of the contract was to permit them to build a through line to Denver, in case they found it desirous or expedient to do so, and that though he had no idea then that they

would avail themselves of it, and he said they would certainly come in on the Denver and Rio Grande line.

TRAFFIC BY WAY OF DENVER.

Q. What was said, if anything, in that conversation by Mr. Cable, as to whether they would want this contract if they did build an independent line? A. I don't know as he said anything directly to that effect, but the inference was that if they built an independent line they would not use the Rio Grande line."

Alleged election to abandon line to Denver.

On cross-examination, he said that Mr. Cable

"wanted to show us what a vast amount of business he would bring over this part of the line between Colorado Springs and Denver, and I assumed it to be his intention to satisfy Mr. Moffat and myself, that all of the business of those companies would come to us at Colorado Springs, and thereby increase the wheelage of the Rock Island road; and he stated at one time 'that it would be increased to the extent of probably what would equal, if not exceed the wheelage of the Rio Grande Company,' that he 'stated numerous times to myself, Mr. Moffat and in the hearing of others' that 'it was the plan of the company to build to Denver, but that they had abandoned that; 'that he did not' 'put it in his letter' that they would not at any time build to Denver, but he put in words that led me to believe, and led the others who were there with me to believe, and Mr. Moffat particularly, that all business that the Rock Island could control would be delivered to us at Colorado Springs; that he does not recollect that these understandings are set out in the contract."

Smith's dep., Rec., p. 840, fols. 2,448, 2,449.
Rec., p. 841, fol. 2,453.
Rec., p. 842, fol. 2,459.
Rec., p. 843, fol. 2,469.

The complainant introduced testimony in rebuttal.

Concerning this matter, Mr. Cable testified:

"And affiant further says that it was from the beginning, the intention of the Chicago, Rock Island and Pacific Railway Company to extend its system of railway from the eastern boundary of the State of Colorado to the cities of Denver, Colorado Springs and Pueblo; that the articles of incorporation of the Chicago, Rock Island and Colorado Railway Company were prepared by its general solicitor, having in view such construction and operation; that if any change of purpose was declared in the articles of incorporation, finally executed and filed, such change was incorporated therein by the said Ed-

Cable's affi. Rec., pp. 901, 902, fols. 69–72.

TRAFFIC BY WAY OF THE UNION PACIFIC.

Alleged election to abandon line to Denver.

ward O. Wolcott, without the authority or knowledge of his client; that while he did advise it that he had made some changes, it was suggested by him that none of these were material; that while the negotiations were in progress and near the time when the contract of February 15th, 1888, was executed, a corps of engineers were engaged in the survey of a line, from a point on the line which has since been constructed by the most direct, practicable route to Denver; that it was fully understood by all of the parties at the time, that such direct line to Denver would be ultimately either constructed on such line or secured by lease, and that said contract was prepared with full knowledge upon the part of said E. O. Wolcott, and as affiant believes, the officers of the Denver and Rio Grande Railroad Company, that the acquisition of such direct line was contemplated, and that when acquired the terminal property covered by the contract at Denver would be used in its operation;

* * * * *

Cable's aff. Rec., p. 902, fol. 75.

that at the time of entering into said contract, and during the negotiations preliminary thereto, the said Chicago, Rock Island and Colorado Railway Company and the parties proposing the same, were considering the question of building the railroad, owned by the last named company, direct from the western boundary of the State of Kansas to the city of Denver, and also of building directly to the city of Colorado Springs and coming thence to the said city of Denver over the tracks of the defendant; but that it is not true that the provision of the contract requiring the said Chicago, Rock Island and Colorado Railway Company to notify the Denver Company on or before the first day of April, 1888, whether or not it elected to build its said line to Colorado Springs was meant and intended as an election to abandon the line direct to Denver; neither is it true that it was agreed or understood that the contract of February 15, 1888, should become effectual and operative only upon the adoption of a route to Colorado Springs to the exclusion of the route from the western boundary of the State of Kansas direct to Denver; that neither the Chicago, Rock Island and Colorado Railway Company nor The Chicago, Rock Island and Pacific Railway Company ever entertained any purpose to abandon any power conferred upon it by its articles of incorporation to construct a main line to Colorado Springs and to acquire branches from such main

—Rec., p. 903, fol. 78.

line by construction, purchase, lease or otherwise, to other points within and without the State of Colorado; * * * that it is not true that he at any time stated to S. T. Smith, the general manager of the Denver and Rio Grande Railroad Company, or any other person, that

TRAFFIC BY WAY OF THE UNION PACIFIC.
Alleged election to abandon line to Denver.

said Chicago, Rock Island and Colorado Railway Company, or said Chicago, Rock Island and Pacific Railway Company would not construct or acquire a line running direct to Denver from some point on the line of the said Chicago, Rock Island and Colorado Railway Company, east of Colorado Springs": that, "on the contrary, this affiant at all times intended to promote the construction of such a direct line to Denver: that on the 14th day of February, 1888, the terms of said contract of February 15th, 1888, were agreed upon between this affiant and the president and general manager of the Denver and Rio Grande Railway Company, although said contract was not formally executed by said Denver and Rio Grande Company until some time thereafter; that on the evening of the 15th day of February, 1888, this affiant was interviewed by a person who purported to be a reporter for the Rocky Mountain News, a daily newspaper printed and published in the city of Denver, and of general circulation in said city: that this affiant, in said interview stated, among other things, that the purpose of his visit to Denver was to make certain arrangements, referring to the said contract with the Denver and Rio Grande Railroad Company, and that he thought those arrangements would be made, and that if they were made the Rock Island Company would come to Colorado and Denver direct: that the report of said interview was printed in a prominent place, with prominent headlines, in said newspaper published on the morning of February 16, 1888."

Fletcher's first aff't.
Rec., p. 931, fol. 187, *et seq.*

Two affidavits by Donald Fletcher are in the record. In the first, made at the instance of the complainant, he testified, that he was president of the Board of Trade of Denver in January, February and March, 1888, and

—"that he knows that during said months the proposed extension of the Chicago, Rock Island and Pacific Railway Company, by means of a local corporation which it should control, from the western boundary of the State of Kansas to the cities of Denver, Colorado Springs and Pueblo, was notorious in the said city of Denver, and was a matter of much public discussion: that the said chamber of commerce and board of trade appointed a committee to confer with the officers of the Chicago, Rock Island and Pacific Railway Company, with a view to inducing it to construct its railway to the said city of Denver direct, and that a proposition was made in a meeting of said chamber of commerce and board of trade and favorably considered, in which it was stated, as the mind of said chamber of commerce and board of trade, that the

TRAFFIC BY WAY OF UNION PACIFIC.

Alleged election to abandon.

Chicago, Rock Island and Pacific Railway Company could not expect such patronage from the shippers and merchants of Denver, if they built to Colorado Springs, as a terminus, and that they would be certain to receive it, if they built into Denver direct, and that the officers of the Rock Island Company expressed an intention to secure a direct line to Denver as soon as the necessary arrangements could be made."

At the instance of the defendant, he made another affidavit, in which he said that he had conversations with Mr. Cable about the 15th of February, 1888, and

Fletcher's second aff. Rec., p. 962, fol. 268-270.

—"that in all his conversations with the said Cable, he expressed his own views and those of the chamber of commerce, which were, that unless the Rock Island Company came to Denver by its own direct line, having its own terminal facilities and its own shops for construction and repair, and thereby building up the interests of Denver, it could not look to get the same share of public favor and business that it would enjoy if it made its western terminus at or near Colorado Springs. And that the said Cable discussed the question in that view, and led affiant to believe that he hoped eventually to have his own line to Denver and his own facilities for the transaction of business. And averred that the Rock Island contemplated a through line to the Pacific Coast, and that when such line should be in operation, the through unbroken trains would pass through the city of Denver."

Burns' dep. Rec., p. 591, fol. 518.

Mr. Burns states that it was a common rumor that the Rock Island was operating the railway of the Chicago Company; that it was so understood by the business community; and that the Denver and Rio Grande rejoiced, because it was understood that another main line from Chicago was let into Colorado and into Denver.

(3.) It is also claimed that the Denver yard is arranged for the care of traffic which moves over the Denver line; and that handling traffic received from and delivered to the tracks of the Union Pacific Company subjects the Denver Company to great inconvenience.

Mr. Deuel testified:

Deuel's dep. Rec., pp. 419, 420.

"There is this difference, that any trains coming from Colorado Springs or from Pueblo to Denver, the yardmen are advised several hours before it reaches here of the number of cars in the train, * * * and its probable

arrival at Denver, the time of its arrival, and it gives them a chance to prepare for the reception of the train and taking care of it on its arrival; * * * and it comes into the yard from the end that is provided for the reception of trains from the line. * * *

TRAFFIC BY WAY OF UNION PACIFIC.

"Coming from the Union Pacific Company, it comes through the Union depot and on our passenger tracks, and has to be taken into the upper end of the freight-yard and backed in out of the way, and we have no notice of its arrival, or of the number of cars in its train, until it arrives and the conductor registers." * * * "It causes that confusion that the train arrives without notice to the yardmen how many cars they have in the train, and they don't know when it is going to arrive, and it comes to the wrong end of the yard, and has to be taken to the south end of the yard before it can be taken in on the Denver track."

Convenience.

He stated further that traffic destined to points on the Union Pacific and transported over its tracks by the Rock Island is taken into the Denver Company's yard and then returned to the Union Pacific; that

Dewel's dep.—Rec., p. 421.

"It has to be switched, and the cars destined for the Union Pacific yard put on the transfer track for delivery to the Union Pacific. * * * All cars coming to the Denver Company's yard have to be placed first upon the passenger track of the Denver Company. They come in on the passenger track of the Denver Company."

Mr. Burns testified:

"Under the present arrangement all the traffic going over the Union Pacific the Denver and Rio Grande officials have no control of. On the business coming in over the Rio Grande from the south they do control. In fact, if there was a blockade in Denver, they could hold out the freight south of Denver; that coming over the Union Pacific they can not hold out; consequently, it places the Rock Island in a much superior position as regards the business in the yards as compared with the Rio Grande." * * * "The Rock Island trains come through the Union depot directly into the Rio Grande yard. They occupy, on arriving in the yard, one or more of the most important tracks. Consequently, the cars that arrive on the Rock Island trains must be switched immediately and given preference over Rio Grande business; otherwise the yard would be blocked. * * * All business destined for points on the Union Pacific at Denver are brought into the Rio Grande yards in full train lots.

TRAFFIC BY WAY OF THE UNION PACIFIC.

These trains are switched by the Rio Grande employes, and business for firms, such as C. S. Morey & Company, and McPhee & McGinnity, Sayre-Newton, John Monat & Company, are transferred to the Union Pacific."

Mr. Smith, in speaking of this business over the Union Pacific, says:

"It comes over from the north into the yard, over where the tracks are brought together, and, as I expressed it, it forms a stricture on them in the yard. * * * All trains to and from Denver or Burnham yards in that direction run over this condensed portion of the yard, and, while being occupied in that manner, work is naturally stopped during the occupancy of these tracks by trains going to and from the yards."

Moffat's Affi., Rec., p. 936, fol. 206-208.

He also states that "cars coming in from the north come in on the main tracks, which are used for passenger tracks."

Mr. Moffatt testifies as follows:

"That if said complainant is permitted to transact all freight and passenger business with the Union Pacific Railway between Limon and Denver, and if the Denver and Rio Grande Railroad Company is compelled to handle it, then and in such case great and irreparable damage will result to the said The Denver and Rio Grande Railroad Company; that The Denver and Rio Grande Railroad is 1,500 miles in length; that its principal terminals and business are at Denver, and said business is necessarily handled at the Denver yards of said company; and that the public having business with the Denver and Rio Grande Railroad Company and the said company are and will be greatly hampered and injured in the transaction of their business and the proper delivery of their freight by the introduction into the Denver yards of the business of the Rock Island Company transacted over the line of the Union Pacific Railway Company between Denver and Limon."

(4.) The testimony shows that no account has been taken of wheelage in the yards, and that there is no method by which such wheelage could be ascertained which would not be so expensive as to be impracticable, unless some arbitrary rule should be agreed upon. Mr. Derby stated that such a method is now being observed in a yard in Pueblo. It also appears that the mileage be-

tween Denver and Pueblo is approximate only, as it does not show all movements made by trains.

TRAFFIC BY WAY THE UNION PACIFIC.

(5.) Testimony was also taken as to the proportionate use of the yards at Denver, of the tracks between Denver and Colorado Springs, and between Colorado Springs and Pueblo.

Capacity of yard at Denver.

The traffic of the Rock Island Company into the Denver yards is equal to about ten per cent. of the whole amount.

Pike's dep. Rec., p. 502, fol. 1,172.

Burns testifies that about ninety per centum of the traffic brought into the Denver yards by the Rock Island Company is brought by way of the Union Pacific.

Burns' dep. Rec., p. 530, fol. 1,275. —Rec., p. 537, fol. 1,303.

It is claimed that the yard at Denver is not sufficient in capacity and facilities for the business which is now being done. Mr. Burns so testified.

—Rec., p. 532, fol. 1,283.

Mr. Pike said:

"Our Denver terminals are insufficient to-day to handle our business, to say nothing of the Rock Island business from Colorado Springs, which is in considerable, and every car that arrives over the Union Pacific takes the place of a car of freight over the Rio Grande Road, which we should handle, and by not handling causes delay and loss."

Pike's dep. Rec., p. 458, fol. 996.

* * * * *

"Cars which come over the Union Pacific are taken by the hostlers of the machinery department and a brakeman and are then taken to Burnham."

Mr. Murphy, auditor of the Denver Company, submitted a statement that showed that the Rock Island's proportion of the wheelage between Denver and Pueblo for the months of November and December, 1888, and January, February, March and April, 1889, amounted to 11.25 per centum of the whole amount, and that for the period between May 1, 1889, and August 31, 1890, it was 7.275 per centum, a reduction of 3.975 per centum of the entire wheelage. The operation of the line to Denver by way of Limon commenced May 5th, 1889.

Murphy's Exhibit No. I. Rec., p. 296.

Mr. Josslyn submitted a statement covering the period from June 1, 1889, to August 31, 1890, showing an average wheelage for the Rock Island between Colorado

Proportion of use.

TRAFFIC BY WAY OF THE UNION PACIFIC.

Springs and Pueblo of 12.5 per centum of the whole; between Colorado Springs and Denver, 4.5 per centum, and between Denver and Pueblo, 7.3 per centum of the whole.

Josselyn's statement. Rec., p. 1,226, fols. 1,080½–1,094.

Boynton's aff. and Exhibit. Rec., pp. 927–929.

The testimony shows that of the entire traffic handled in the Pueblo yards, 62 per centum is not moved over the tracks jointly used by the parties under the contract. It passes to and from the branches of the railroad of the Denver Company south and west from Pueblo. Of the remaining 38 per cent., 12.5 is carried to and from Pueblo by the Rock Island, and the remaining 87½ per cent. by the Denver.

Middleton's dep. Rec., pp. 213–215.

(6.) The distance between Denver and Colorado Springs, by way of the railway of the Denver Company, is 75.5 miles. The maximum grade is seventy-five feet in the mile. Thirty per centum of the distance between Palmer Lake and Colorado Springs is of the maximum grade, while 11 per centum of the road between Palmer Lake and Denver is of the same grade. The distance from Limon to Denver, by way of the Union Pacific, is sixty-four miles shorter than by way of Colorado Springs over the Rock Island and Denver railways. The maximum grade of the Union Pacific is 60 in the mile.

Stipulation. Rec., p. 1,239.

The shortest line from Chicago to Denver is the Chicago, Burlington and Quincy Railroad by way of Pacific Junction—1,025 miles. The longest is the Atchison, Topeka and Santa Fe Railway—1,209 miles. The line next below in length is the Rock Island, by way of Colorado Springs, 1,184 miles; by way of Limon and the Union Pacific, 1,120 miles. The shortest line to Pueblo is the Atchison, Topeka and Santa Fe—1,093 miles; not the Chicago, Burlington and Quincy and the Denver Railroad—1,145 miles; the next the Rock Island by way of Colorado Springs—1,154 miles. The distance between Chicago and Colorado Springs, by way of the Chicago, Burlington and Quincy and the Denver Railroad, is 1,100 miles; the Rock Island, 1,108, and the Atchison, Topeka and Santa Fe, 1,138 miles. All other lines are longer.

TRAFFIC BY WAY OF UNION PACIFIC.

Burns's dep. Rec., pp. 576, 577.

Mr. Burns testified, that at one time the construction of what was known as the "Ascequia Cut Off" was contemplated; that the plan was to construct a railway from a point on the Denver railroad about fifteen miles south of Denver to Literdale, on the Colorado Midland Railway; that it would shorten the railway distance between Denver and Leadville and all points west of Leadville seventy-five miles, and that such a railway would divert a large traffic between the same points from the line by way of Pueblo.

Effect of direct line on volume of Denver traffic.

Mr. Pike, the secretary of the general manager of defendant, submitted statements of the effect of transportation over the direct line by way of Limon instead of by way of Colorado Springs, upon the revenues of the Denver Company; and this cross-examination followed:

"Q. Now, this computation which you have presented here, copies of which are set out as Pike's Exhibits 1 and 2, are made upon the assumption that all of the business which the Rock Island Company carries into and from Denver, over the Union Pacific, would be by Colorado Springs if the arrangement with the Union Pacific was canceled? A. Yes, sir.

Q. Do you believe it would? A. Of that I have no knowledge.

Q. Well, you have been indulging in conjectures very largely. What is your conjecture now as to whether or not the Rock Island Company could command this business, could control it, if it had to draw it around by Colorado Springs? A. My conjecture of it is that they would carry very nearly the same amount of traffic.

Q. Would hauling it about seventy miles further over heavier grades still hold the same amount of business? A. I think they would secure the same amount of traffic or nearly so.

Q. You think that distance and grades are not factors to be considered in securing the traffic on passenger business? A. I consider no such thing; there are other things that enter into the securing of traffic which are of vastly more importance than any grade.

Q. What inducement has the Rock Island Company to make a trackage arrangement with the Union Pacific and thereby increase greatly its expenses when it could do its traffic by way of Colorado Springs and only increase its proportion of the wheelage expenses at Denver? A. Well, I presume it was a question of time with them.

TRAFFIC BY WAY OF UNION PACIFIC.

Q. Why should time have any influence if it made no difference in the amount of traffic? A. Well, it does make a little difference.

Q. How much in your judgment, now? A. It varies a great deal. The question of securing traffic is something about which I know very little.

Q. Do you think that the Rock Island Company could secure the passenger traffic it has now to and from Denver if it carried its passengers by Colorado Springs or any considerable portion of the same? A. No, sir, so far as the passenger business is concerned I would consider that it might cut considerable figure.

Q. It would make a very great difference, would it not, in the number of passengers? A. Oh, probably it would.

Q. Would not the expense of carrying the freight from Denver to points east of Limon by way of Colorado Springs be greater than the cost of carrying it from Denver by way of the Union Pacific to points east of Limon? A. The transportation expenses certainly would.

Effect of direct line on volume of traffic.

Q. Is it not more convenient to the public to have its freight and have passengers carried directly from Denver by way of Limon over the Union Pacific than to have them carried by way of Colorado Springs to points east of Limon? A. With passengers to whom time is an object I would consider it preferable to run via Limon.

Q. Isn't the public convenience increased by the shortening of the line, saying nothing of the cost of doing the work? A. The passenger traffic to a considerable extent would be convenienced thereby, I have no doubt.

Q. How about fast freight trains? A. Well, not so much.

Q. Do you think a fast freight train could be moved from Denver to Limon by way of Colorado Springs as quick as by the Union Pacific road? A. I gave up thinking anything about it a long while ago. It never occurred to me.

Q. And you have never given that subject any consideration then? A. I learned that many years ago.

Q. And what is the result of your judgment? If you learned that so many years ago, please state whether or not you think a train could be moved—? A. I don't think anything about it. The fact is plain itself.

Q. You know it could not be done? A. I know that it could be moved to Limon ordinarily quicker than by Colorado Springs.

Q. Then it would be an important factor, would it not, the difference as to freight transportation by fast freight trains? A. It would be a factor, but with a

great deal of freight it is not a very important factor, that is with some classes of freight."

TRAFFIC BY WAY OF UNION PACIFIC.

Mr. Burns testified as to the same matter:

Burns' dep.

Rec., pp. 538-542, fols. 1307-1324.

(By Mr. Withrow): "Q. Now, Mr. Burns, what proportion of the business brought to Denver and taken from Denver by the Rock Island Company, could, in your judgment, be carried by way of Colorado Springs? A. I should judge that the entire business could be carried by way of Colorado Springs.

Q. Do you believe that the Rock Island Company could get the business it carried it by way of Colorado Springs? A. I think that the shorter line from Limon to Denver has brought them into competition with the Union Pacific, making a short line, and increasing their business, for which they should be willing to pay.

Q. Well, about what proportion of the 9/10 do you think is attributable to that cause? A. I should say 15 per cent of the whole.

Effect of direct line on volume of Denver traffic.

Q. Do you think that all of this business could be secured if the arrangement to run between Limon and Denver should be abandoned? A. I believe that a good deal of it could be retained.

Q. What portion of it could be retained? A. I should think they would lose five per cent.

Q. The Rock Island lose five per cent? A. Yes, sir.

Q. Not over that? A. I think not. I think that the promptness with which the business is transacted in the Denver yard would hold the other ten per cent. as against the Union Pacific.

Q. Why didn't it hold it before this arrangement was made? A. The reason in my judgment is that when the Rock Island opened for business in Colorado, that they brought their business in here on cut rates and they flooded the market with merchandise, consequently there was a lull in the business for five or six months, and that is the reason why there was a falling off. If they had done the business gradually from the time they commenced running over the Rio Grande, at the time that the contract went into effect on the Union Pacific, they would have had sufficient business.

Q. Do you think that the Rock Island Company could carry this traffic by way of Colorado Springs, a longer distance by seventy miles, over grades of seventy-five feet, covering thirty per cent. of the distance between Colorado Springs and Palmer Lake in competition with the Union Pacific and without any portion of the traffic that the Union Pacific controlled before? A. I think they could.

TRAFFIC BY WAY OF THE UNION PACIFIC.

Effect of direct line on volume of Denver traffic.

Q. At the same rates the Union Pacific charged? A. Yes, sir.

Q. And could have made just as much money? A. Yes, sir.

Q. In other words, it is your judgment, as a railroad man, that freights and passengers can be carried sixty-eight miles over heavy grades without any increased expense? A. No, sir, it is not my judgment.

Q. Then you think they would lose something? A. They would lose nothing in expense; securing freight is not a matter of operating expense.

Q. It is a matter of some consequence to the revenues of the company, isn't it? A. Yes, it would be.

Q. Now, Mr. Burns, do you undertake to say that the Rock Island could carry from Limon, by way of Colorado Springs, to Denver at the same expense that it could carry from Limon to Denver over the Union Pacific? A. I did not so state.

Q. You did not? A. I do not want to be understood as saying that.

Q. Then if the rates for the two lines are precisely the same, wouldn't the cost of carrying by way of Colorado Springs be any more than the cost of carrying freight to Limon? A. The expense of operating would be more, add more to the mileage, but that ought not to affect the total business.

Q. Wouldn't it affect the ability of the Rock Island Company to compete with the Union Pacific? A. Not with the joint terminal facilities that the Union Pacific have, and had up to that date. Once having secured fifteen per cent. of the Union Pacific business, they would be able to hold ten per cent. via Colorado Springs.

Q. What do you mean by fifteen per cent. of the Union Pacific business, and ten per cent.? A. I mean fifteen per cent. of the business that was formerly carried by the Union Pacific.

Q. Do you think that the traffic of the Rock Island to and from Denver increased only fifteen per cent. after this change was made in May, 1890? A. You asked me how much I believe?

Q. I ask if you think it was increased only fifteen per cent.—the Denver traffic? A. I should say about that: yes, sir.

Q. Not more than that? A. I should not think so.

Q. Then you think that about seventy-five per cent. of the traffic of the Rock Island Company to and from Denver passed by way of Colorado Springs before this traffic arrangement was made with the Union Pacific? A. I should think so; yes, sir.

TRAFFIC BY WAY OF UNION PACIFIC.

Q. Now, if you should be mistaken as to those figures, it would upset all of those calculations and theories about that, would it not? A. Not at all.

Effect of direct line on volume of Denver traffic.

Q. You say that ninety per cent. of the traffic of the Rock Island to and from Denver passed over the Union Pacific, and that eighty-five per cent. of the same traffic passed over the Denver and Rio Grande by way of Colorado Springs before the arrangement was made between the Rock Island and the Union Pacific. Was the business of the Rock Island Company to and from Denver by way of Colorado Springs, when this arrangement took effect between the Union Pacific and the Rock Island, equal to eighty-five per cent. of the present business which the Rock Island does to and from Denver? A. No, sir.

Q. What percentage of it, was it? A. I should say that the business now being done is much larger than it was at the time that the contract went into effect.

Q. About what percentage larger? A. Fifty per cent. larger.

Q. Now, you think that fifty per cent of the present traffic of the Rock Island Company to and from Denver has been added by the arrangement for running those trains directly between Limon and Denver, don't you? A. No, I said about fifteen per cent.

Q. That is, the traffic has increased fifty per cent and only fifteen per cent of the increase has been by way of the Union Pacific? A. I said this, that it had increased fifty per cent now over the period when the contract went into effect over the Union Pacific.

Q. Now, Mr. Burns, isn't this all pure unmitigated conjecture on your part? Do you know all of these things? Isn't it all conjecture? A. Not any of it:

Q. You can tell precisely what would have been done if a certain other series of events had happened, could you? A. I do not claim to do that.

Q. Now, Mr. Burns, can you state as a fact what volume of business the Rock Island Company would be doing to-day to and from Denver if it carried all its traffic by way of Colorado Springs? A. By carrying all of its traffic by way of Colorado Springs, I should say that it would do ninety-five per cent of the present business.

Q. That is what you guess? A. No, I know it.

Q. Are there many railroad men, Mr. Burns, who can tell absolutely what a railroad company can do in the future; that it will do certain things? A. No, I do not think so; but I do say that it can do ninety-five per cent of their present business and do it by Colorado Springs.

Q. Do you undertake to say, Mr. Burns, that you know just what volume of business the Rock Island

TRAFFIC BY WAY OF UNION PACIFIC.

would have to-day if it carried all the traffic it could secure by way of Colorado Springs? A. I would say to the very best of my belief that it would have ninety-five per cent.

* * * * *

Effect of direct line on volume of Denver traffic.

Q. And you think that any road competing with the Union Pacific could do as much business as the Rio Grande alone now has, less 15 per cent., and carry it over those grades, do you? A. I do, and I judge from the Missouri Pacific being a longer line, still holding their proportion of the business and having materially increased it in the last year; and the Rock Island could have done the same.

Q. It didn't do the same, did it? A. It did do so; yes, sir. The Rock Island business in Denver is better than ever before.

Q. You think that this arrangement to run from Limon to Denver is not a matter of any consequence to the public, do you? A. I think it is; it gives it quicker time.

Q. Isn't it a matter of public interest? A. To the public it is a matter of great interest on passenger business.

Q. Isn't it on fast freight business? A. It is a matter of more consequence to the Rock Island because it gives them a portion of the business of the Union Pacific over their joint line.

Q. And gives it a portion of the business that it could never otherwise secure, don't it? A. I think that if it had done business over the Rio Grande it could have secured 95 per cent. of the same business that it is now getting.

Q. You say that the Rock Island Company has secured an increased business using of this new line, and that it ought to pay for it. Whom should it pay for it? A. It should pay the Rio Grande Railroad for doing its switching in the Denver yard for terminal facilities.

Q. Do you say it don't pay anything for terminal facilities now? A. It does for the business that comes in over the Rio Grande road, but not for the business that comes in over the Union Pacific.

Q. Don't it pay over $100,000 a year for the right to use all of the road from the east and from and including Denver and Pueblo? A. I believe it does for the business coming in by the way of Colorado Springs."

Burns' dep. Rec., p. 537, fol. 1303.

Mr. Burns states that the Denver business of the Rock Island Company coming in over the Rio Grande "each day will contain from five to seven cars, and that is busi-

ness that originates at the stone quarries at Manitou and adjacent to Colorado Springs. The other business from the east, consisting of from twenty to twenty-five cars, comes in over the Union Pacific each day."

TRAFFIC BY WAY OF UNION PACIFIC.

Effect of direct line on volume of Denver traffic.

Mr. Burns testified further:

Rec., pp. 580-582, fols. 1475-1482.

"Q. You stated that the Missouri Pacific had been able to hold a large traffic between Denver and Kansas City. About what volume, as to the number of cars per day does the traffic of the Missouri Pacific Company amount to? A. From Denver?

Q. And to Denver. A. From Denver, very little; to Denver, on an average of ten cars per day.

Q. What does that consist in? A. Merchandise of all kinds, pipe, cars of lard, personal goods, and such as that.

Q. From Denver you say their business is very light? A. Yes, sir.

Q. What does that amount to? A. Probably two cars per day.

Q. What does that consist in? A. It consists of merchandise and household goods, and such as that.

Q. How many cars per day does the Rock Island bring over the Union Pacific? A. From seventeen to twenty-five.

Q. And how many does it take out over the Union Pacific? A. It takes probably ten to sixteen, part of them empty cars.

Q. How many cars does it bring into Denver by way of Colorado Springs? A. From four to eight just at present, but formerly it ran light, just the caboose, had no business.

Q. How much does it carry out of Denver by way of Colorado Springs? A. It takes empty cars out; very few loaded; probably one or two a day.

Q. But it brings in from seventeen to twenty-five a day by way of the Union Pacific? A. Yes, sir.

Q. And the Missouri Pacific brings in about ten a day? A. Yes, sir.

Q. Would it average ten? A. I should think it would average ten.

Q. I understood you to say that you thought if the Rock Island continued to do business exclusively by way of Colorado Springs, it would have done just as well as the Missouri Pacific is doing? A. Within about five per cent of what they are doing now, I mean the Rock Island.

Q. That is, they would have had about eight cars a day? A. Probably fifteen by Colorado Springs.

TRAFFIC BY WAY OF UNION PACIFIC.

Effect of direct line on volume of Denver traffic.

Q. You say within five per cent of what the Missouri Pacific is doing, which is only ten? A. Within five per cent what the Rock Island is doing via the Union Pacific.

Q. You stated you thought it would hold the same traffic the Missouri has? A. I said it would have held the traffic it is now doing within five per cent., if it had still continued to come in by way of Colorado Springs.

Q. Why should it have more than the Missouri Pacific if it had continued to do its business by way of Colorado Springs? A. It is somewhat of a shorter line.

Q. Does that have any influence on that? A. On time freight and on time passengers.

Q. You were not so clear about that yesterday, were you? A. Yes, I was clear I think, but you did not give me any opportunity to express myself.

Q. What is the difference in distance between the two roads counting by way of Colorado Springs, between the Missouri Pacific and the Rock Island? A. I can't say from memory.

Q. Well, about how much? A. I should say it was about 100 miles.

Q. The Missouri Pacific enjoys the friendship of the Rio Grande, don't it? A. We have a very equitable arrangement with the Missouri Pacific and get along very amicably with them.

Q. You give them a great deal of business, don't you? A. We do business reaching into Southern Colorado that is delivered to them at Pueblo.

Q. You give them all you can? A. We don't discriminate between them and the Rock Island. We give the Rock Island all they can get.

Q. This correspondence that has been put in here indicates that. Do you wish to be understood as saying that the Rio Grande gives the Rock Island any business that it can avoid giving it? A. I know that the Rio Grande does give the Rock Island business.

Q. Does it give any business to the Rock Island it can avoid giving? A. I don't think that they take any pains to keep freight from going by way of the Chicago, Rock Island and Pacific.

Q. Did you ever deliver any unconsigned freight to the Chicago, Rock Island and Pacific? A. I am not informed as to that."

He further testified:

Burns' dep. Rec., pp. 589, 590, fols. 511-513.

"Q. I understood you to say that the Rock Island cut rates pretty severely when it first commenced operating on its road here? A. They did.

Q. And that increased the volume of its business, didn't it? A. That placed the business about as it is now. They had a very large volume of business.

TRAFFIC BY WAY OF THE UNION PACIFIC.

Effect of direct line on volume of Denver traffic.

Q. They wouldn't have had as large a volume of business if they had maintained rates?

(Objected to as asking for an opinion.)

A. That increased the volume of its traffic. The Rock Island Road was not the only road that was cutting rates at that time.

Q. Did that increase the volume of its traffic? A. It did.

Q. And it increased the proportion of its mileage didn't it? A. It did.

Q. In what months did that cease? It existed for how many months? A. That occurred in November, December and January, 1888 and 1889, and during that time was the heaviest coal traffic of the road; consequently the situation was then as it is now—about as it is now.

Q. Then they had more mileage during those months than they would have had if they had maintained rates, didn't they? A. I should judge so; yes, sir.

Q. And if they had maintained rates, while other roads were cutting them, they would have had a smaller amount of mileage still, wouldn't they? A. They would. I am glad they cut the rates."

Pike's dep. Rec., pp. 464, 465, 1,018, 1,021.

(7.) Mr. Pike made computations for the purpose of showing the amount in which the revenue of the Denver Company was reduced by the operation of trains by the Rock Island over the Union Pacific between Limon and Denver. On his examination-in-chief he was requested to state them to the "stenographer," and this followed:

"If all trains via the Union Pacific had been brought to Denver via the Rio Grande from Colorado Springs the proportion instead—

Q. Instead of what; of passing over the Union Pacific? A. Instead of passing over the Union Pacific—the proportion of the joint expense of the first district from May 12th, 1889, to August 31, 1890, would have been thirteen and five-tenths per cent. instead of seven and seven-tenths per cent.

Q. Thirteen and five-tenths per cent? A. Thirteen and five-tenths per cent., instead of seven and seven-tenths per cent. upon which bills were rendered—the proportion of the joint expense for which bills were rendered, and which bills excluded unsettled items—and I previously stated that

TRAFFIC BY WAY OF UNION PACIFIC.

Effect of direct line on volume of Denver traffic.

bills were not to be made for unsettled items from May 12, 1889, to August 31, 1890—at seven and seven-tenths per cent. amounted to more than $38,000. Had all the Rock Island trains via Union Pacific been brought to Denver via Rio Grande from Colorado Springs, the amount of these bills would have been, at thirteen and five-tenths, more than $70,000, by which we would have received in that period more than $31,000 in excess of what we should receive by the bills rendered. There are various other items of detail in here which merely confirm what I have said.

Mr. WOLCOTT: I ask to append these two estimates.

A. May I state in explanation of the two sheets, that they are different. I stated the one which included all the Rock Island trains. In the other statement I have excluded one train and an engine and caboose between Colorado Springs and Denver, which probably would not have been run had the Union Pacific train been run between Colorado Springs and Denver; this is plainly seen by the statement."

He was cross-examined as to the proportion of the traffic which could be controlled for a line exclusively by way of Colorado Springs.

Contract, Rock Island and Union Pacific, Art. II. Rec., p. 201, fols. 171, 172.

The Rock Island Company, by its contract with the Union Pacific, undertakes to pay for the use of the tracks between Limon and Denver, "the sum of 25 cents per mile for each and every mile over which any passenger train, and thirty cents per mile for each and every mile over which any freight train shall be moved on the track between the station at Limon and the Union Depot, or the connecting track of the Denver and Rio Grande Railroad Company in the City of Denver, * * * when the total sum of the mileage hereby agreed to be paid for each train shall not in any year be equal to $50,000, it will pay to the Pacific Company in addition thereto the difference between the sum of said train mileage, and the sum of $50,000."

RENTAL.

Pike's dep. Rec., pp. 484, 485, fols. 1,100-1,103.

(8.) The interest on the valuation of the property paid by the Rock Island Company amounts to over $93,000 per year, to which is added taxes $15,000 per year; total, $108,000.

Its proportion of the expenses of maintenance and re-

RENTAL.

pairs, amounts to about $30,000 per year. This added to the interest and taxes makes the whole amount to about $135,000 per year.

Murphy's dep. Rec., pp. 289, 290, fols. 330-332. —Rec., p. 296.

Up to August 31, 1890, there had been added to the valuation on which the Rock Island Company pays interest at the rate of two and one-half per cent. per annum, $747,452.97. Of this $104,491.99 were added on the Denver yard and terminal property; and $31,435.15 at Burnham; $3,667.15 at Littleton; $66,776.45 at Colorado Springs and $109,185.04 at Pueblo.

Smith's Exhibit. No. 22. Rec., p. 881.

On the 6th of January, 1890, Mr. Smith submitted to Mr. Cable a proposition for additional improvements in the yards at Burnham and Pueblo, to be constructed at an expense of $355,000, which should be capitalized under the contract.

2. *As to the right of the complainant to use its own motive power and employes in the yards.*

SEPARATE MOTIVE POWER AND EMPLOYES.

When the St. Joseph Company commenced the operation of the Denver railroad under the contract, an agreement was made under which it cared for the equipment and traffic of the lessee in the yards at Denver and Pueblo. Passenger cars were stored on what are known as "coach tracks" in the yard at Burnham, where they were cleaned by employes of the Denver Company. The cars of the lessee were switched about the yards by the engines and crews of the Denver Company, and freight was handled into and out of the warehouses to the cars by its employes.

In the month of April, 1890, Mr. E. St. John, general manager of complainant's railway, called upon Mr. Smith, to arrange for the cleaning of complainant's coaches at Denver and Pueblo by its own employes. Three interviews occurred between the parties. Mr. Verbryck, Mr. Allen, Mr. Wilson and Mr. Moffat were present at some or all of them.

Mr. St. John called Mr. Smith's attention to Article 1, section 2, of the contract, and contended that it gave the

SEPARATE MOTIVE POWER AND EMPLOYES.

St. John's dep. Rec., p. 1128, fol. 680.

Smith's Exhibit. No. 3. Rec., p. 876, fol. 2588.

Smith's dep. Rec., p. 761, fols. 2148, 2149.

right to the Rock Island Company to use its own employes; and this was denied by Mr. Smith. Mr. St. John then proceeded to Colorado Springs. While on the way he sent to Mr. Smith the following telegram, bearing date the 26th of April. "Our interview with Mr. Sample was without result. Do I understand you to take the position that we have no right to do the work of car cleaning, and the necessary cleaning of our engines at Burnham with our own force, if we so elect? We are not satisfied with the work as now done, either at Burnham or South Pueblo. Please wire me at Colorado Springs." To this Mr. Smith sent the following answer on the 29th: "Answering your telegram of the 26th, if you so elect you have the right, at your own expense, with your own men, and your own tools and appliances, to clean your own cars and engines; but you have no right to use our buildings, shops or implements for that purpose without our consent, under definite arrangements. If you so desire, we will assign for your work, upon reasonable terms to be agreed upon." After visiting Pueblo with a view to arranging for having the Rock Island work done by Rock Island employes, Mr. St. John returned to Denver where he had a third interview with Mr. Smith. At this interview Verbryck, Smith, Allen and Moffat were present. Mr. St. John said to Mr. Allen in the presence of Mr. Smith, "that Mr. Smith declines to let us use our own men at Burnham." Mr. Allen answered: "He does not deny our right under the contract to do it." When Mr. Smith replied: "Contract or no contract, we won't permit you to do it." Mr. St. John then said: "Mr. Smith, as I understand you, if Mr. Verbryck and Mr. Wilson, under the instructions from our president, should go to Burnham this afternoon, and attempt to put our own men there at work you would clear them out"; to which Mr. Smith replied: "That is just about what we would do."

St. John's dep. Rec., p. 1130, fols. 686-688.

—Rec., p. 1132, fols. 694-696.

Allen's affl. Rec., p. 915, 916, fols. 126, 127.

Verbryck's dep. Rec., pp. 1033-1037, fols. 227-292.

—p. 1041, fol. 309.

There is an apparent conflict of testimony as to what was said in these conversations. Mr. St. John is sustained

SEPARATE MOTIVE POWER AND EMPLOYES.

as to all of them by Mr. Verbryck and Mr. Wilson, and as to the third one by them and Mr. Allen.

Wilson's affl. Rec., p. 925, fols. 165, 166.

Mr. Smith denies generally that he ever admitted that the Rock Island had a right to clean its cars with its own employes, *in the shop grounds at Burnham*, and explains his telegram to Mr. St. John by saying that it was a concession of the right as to tracks covered by the contract, but outside the shop grounds.

Smith's dep. Rec., p. 760, fols. 2142, 2143.

—Rec., pp. 761, 762, fols. 2148-2150.

—Rec., pp. 809-813, fols. 2330-2349.

—Rec., p. 815, fol. 2353.

Mr. Moffat says, "that he was present in the room during the conversation between Mr. Smith and Mr. St. John, and was sitting where he could hear the conversation; that the statement of Mr. Allen is untrue; and that in said conversation, on the contrary, Mr. Smith emphatically and directly stated to the said St. John that he, the said Smith, did contend that the complainant company had no right to introduce its own employes into the Denver yards for the purpose of cleaning its coaches.

Moffat's Affl., Rec., p. 938, fols. 216, 217.

Burnham is in Denver and may be included in the phrase "Denver yards," though the Burnham yards and Denver yards are over a mile apart. Mr. Smith says he intended to admit "the right of the Rock Island to introduce officers and employes" engaged in cleaning engines and cars anywhere upon the line of the road for the performance of its labor, "except in the shops at Burnham" and that he does not know any difference between that class of employes and any other under the contract.

Smith's dep. Rec., p. 815, fol. 2,353.

He refused to permit any tracks, either in or out of the shop grounds, at Burnham to be used for the purpose of cleaning cars. An application was made for the designation of a track on which the cars should be cleaned and it was refused. Mr. St. John then selected a track for that purpose and Mr. Smith refused to consent to its use. The reason assigned for the refusal was, that the Denver Company has a large force employed in its shops at Burnham and the proximity of another force under a separate employ and control would cause friction and demoralization.

Smith's dep. Rec., pp. 809, 810, fols. 2,332-2,334.

—Rec., p. 812, fols. 2,341 2,343.

—Rec., p. 813, fols. 2,347, 2,348

SEPARATE MOTIVE POWER AND EMPLOYES.

Smith's dep. Rec., p. 762, fols. 2,153, 2,154.

The Rock Island at the same time demanded the right to clean and repair its cars on the joint tracks at Pueblo, and it was conceded. It is conceded that Article 1, section 1, covers the shops at Pueblo; tracks were assigned for that purpose in the shop grounds at that place, and a building was erected for the storage of tools, small supplies, and like purposes.

Smith's dep. Rec., p. 750, fol. 2,026 *et seq.*

Smith testifies that he declined to permit the Rock Island Company to use its own motive power and its own employes in the yard at Denver, and among the reasons for such action says that the yard did not have sufficient capacity for two companies; that one crew would be apt to impede the other in its work; that it would be much more economical to have the engines and the employes used jointly; that work under one common yardmaster would obviate these difficulties very largely and would prevent them when the yardmaster was on duty.

Smith's dep. Rec., p. 751, fols. 2,109-2,111.

He also states that it was understood, before the contract was signed, that all persons who would be engaged in joint service should be employed by the Rio Grande Company and carried upon its pay-rolls, with the exception of those engaged in train service. This included engineers.

He further testifies that there were several conversations after the contract was executed as to who should be owners of the engines used in the yards; that the engines used so far have been the property of the Denver Company, and used in the joint service.

Rec., p. 813, fols. 2,346-2,349.

He was requested to state "what reason existed against using any tracks outside of the shop yards at Burnham for the cleaning of cars which did not apply with equal force to the use of the shop grounds at Pueblo," to which he answered, that, as he understood it, the shop grounds at Pueblo were not excluded from the lease, while those at Burnham were. His attention was again called to the grounds outside of what were claimed to be shop grounds at Burnham, when he said:

SEPARATE MOTIVE POWER AND EMPLOYES.

Opinions of experts.

"The difference between the two cases is, that at the Burnham shops we have a very large force of mechanics and laborers and others in making general repairs and building new cars, and for work and other purposes, while at Pueblo we only have the ordinary car repairers, hostlers, engineers and firemen and that class of people, and putting another force within the limits of those grounds would not conflict so seriously as they would at Burnham. * * * There would not be any objection to using the tracks outside of the shops at Burnham if we had ample tracks there to handle the business, and if there were suitable tracks there for the purpose of cleaning and repairing Rock Island cars; but as I have stated three or four times distinctly, the sole reason for keeping them out of that portion of the ground was that all of the tracks were required to handle the business and without them it would blockade the Denver yard and our terminals at Denver and vicinity, and it would have made it impossible almost, or impracticable, to use them.

Smith's dep. Rec., p. 814, fols. 2,352, 2,353.

He repeated the objection, on his further cross-examination, and stated that the fact that the Pueblo shop grounds were not excluded from the contract while the Burnham shops were, and the proximity of two forces employed by different employers were the only reasons for refusing to admit the employes of complainant at Denver, while admitting them at Pueblo.

The correspondence between Mr. Cable and Mr. Smith and the action with regard to the settlement of the questions raised, by reference, as provided by the contract, is set out in the first point of this abstract.

A large amount of testimony was taken concerning the practicability of operating yards like the one at Denver by two companies. The following witnesses were of opinion that it would be impracticable to operate a yard like the terminal yard at Denver with the motive power and employes of two companies, even if the motive power and employes engaged in operating engines, cars and trains were under the supervision of the yardmaster or other proper officer of one of the parties:

Burns' dep. Rec., p. 533, fols. 1,286-1,288.

Campbell's dep. Rec., p. 671, fol. 1,825.

J. J. Burns, superintendent of transportation for defendant; Alexander Campbell, superintendent of Burlington and Missouri River Railroad Company; Joseph V. Choate, formerly a division superintendent for the Union

SEPARATE MOTIVE POWER AND EMPLOYES.

Pacific; James W. Dolbey, superintendent of terminal facilities of the Missouri Pacific at Kansas City; William E. Deuel, superintendent of division for defendant; Edward Dickinson, general superintendent Baltimore and Ohio Railroad, Trans-Ohio Division; A. W. Dickinson, superintendent of the Missouri Pacific; W. F. Merrill, general manager of Chicago, Burlington and Quincy, and Harrison D. Pike, secretary to the general manager of the defendant.

Dolbey's dep. Rec., p. 1,098, fol. 855.

Deuel's dep. Rec., p. 424, fol. —.

Edward Dickinson's dep. Rec., p. 1,160, fol. 811.

Rec., p. 1,154, fol. 818.

A. W. Dickinson's dep. Rec., p. 1,122, fol. 652.

Pike's dep. Rec., p. 488, fols. 1,114, 1,115. Choate's dep. Rec., pp. 630, 631, fols. 1,887, 1,879. Merrill's dep. Rec., p. 1,186, fol. 918.

Opinion of experts.

The following witnesses were of opinion that the supervision of one yard-master would render joint operation less objectionable but not entirely satisfactory:

George O. Clinton, Superintendent of the Elgin, Joliet and Eastern Illinois Railroad Company; Orrin A. Derby, division superintendent Missouri Pacific Railroad; Daniel Howard, station agent Grand Trunk Railway, Chicago; Arthur T. Palmer, division superintendent of the Union Pacific Railway; Sylvester T. Smith, general manager for defendant.

Clinton's dep. Rec., pp. 1,176, 1,177, fols. 878-880.

Derby's dep. Rec., p. 707, fols. 1,938 *et seq.*

Howard's dep Rec., p. 1,209, fol. 974.

Palmer's dep. Rec., p. 631, fol. 1,646.

Smith's dep. Rec., p. 751, fol. 2,109.

The following witnesses were of opinion that such operation was entirely feasible and practicable: W. I. Allen, assistant general manager for the complainant; A. G. Amsden, division superintendent Michigan Southern and Lake Shore Railway; R. R. Cable, president of the complainant; Jeremiah Daly, yardmaster Lake Shore Railway Company, Toledo, Ohio; Charles Dunlap, superintendent for complainant; R. J. Duncan, superintendent Colorado Division of the Union Pacific Railway; John McCormick, C. F. Meek, general manager of one of the divisions of the Union Pacific Railway; John A. Riley, general yardmaster Atchison, Topeka and Santa Fe Railroad; H. Monkhouse, in Machinery Department of complainant; Benjamin Thomas, vice-president and general manager of the Chicago and Western Indiana Railroad and the Belt Railroad, Chicago; Charles H. Wheeler, thirty-six years' experience in railway service and George F. Wilson, master mechanic for complainant.

Allen's dep. Rec., p. 919, fol. 141.

Amsden's dep Rec., p. 988, fols. 104, 105.

Cable's Affi., Rec., p. 905, fols. 86-90.

Daly's dep. Rec., p. 1,084, fols. 496-498.

Dunlap's affi. Rec., p. 921, fols. 150-152.

Duncan's affi. Rec., p. 911, fols. 113-115.

McCormick's affi. Rec., p. 914, fols. 121, 122.

Meek's affi. Rec., p. 910, fols. 108, 109.

Riley's dep. Rec., pp. 1,223, 1224, fols. 1,064-1,073.

Monkhouse's affi. Rec., p. 923, fols. 157, 158.

Thomas' dep. Rec., p. 1 019, fols. 217-129. *Wheeler's dep.* Rec., p. 963, fols. 15-18. *Wilson's dep.* Rec., p. 925, fols. 164, 165.

SEPARATE MOTIVE POWER AND EMPLOYES.

Mr. Deuel, superintendent of the division of the Denver Company's railway, which embraces the line between Denver and Pueblo, concerning the joint occupancy of the yards by switching engines and employes of the two companies, testified:

Deuel's dep. Rec., pp. 424, 425, fols. 860-866.

Opinion of experts.

"In my opinion, it is not practicable for the two companies to operate their own engines doing their exclusive work, in one yard. The only way that it could be done to advantage, if the yard was large enough to assign certain tracks to the different companies, it probably would work out; but in the condition of the Rio Grande yard, no crew could work there successfully without it should do the joint business, that is, handle cars as they came for either; but it would be impossible for them, either company, to go in and do their own exclusive work. * * * Well, our yard is divided up into three classes. We have a system of wagon tracks, that is the leader to it, and the drill track the switching is done on; all of our wagon tracks come off from this leader. If the Rio Grande was occupying this leader, it would be impossible for the Rock Island to take out any of its cars at the wagon track, and *vice versa*. Another part of the yard is assigned for the making up of outgoing trains, and only one engine could work on either of these places at the same time, and there would be bound to be confusion if they were both trying to reach this point at the same time. * * * I don't think anybody could handle two classes of employes in one yard * * * because of the confusion and the wrangling, and the liability to accidents and all that. * * * It would always be an excuse for not doing the work. If they did not do the work the excuse would be that the Rock Island was using the track, and if the Rock Island employes could not do the work, the Rock Island would make the excuse that the Rio Grande had the track. It would be a continual source of annoyance and confusion to the operating department to have two different companies trying to do the work in one yard. I don't think it is possible for the work to be done in the yard if each company maintained its own force. * * * The only way a joint agency could be run would be to have separate buildings for them, several freight-houses; that is, not joint agents, but the only way separate agents could be maintained and work satisfactorily to both companies. * * * The danger would be this, if an independent force was put into the same depot, and an agent occupied the same room, or a solicitor, you might say, it would be continual confusion, annoyance and wrangling

SEPARATE MOTIVE POWER AND EMPLOYES.

Opinion of experts.

as to who should get the business, as to what road the freight should go over. * * * No, sir; a common yard-master would not do away with the trouble, unless engines were instructed to do common work."

Denel's dep. Rec., pp. 446, 447, fols. 951-955.

This testimony is substantially repeated by the witness on cross-examination.

Burns' dep. Rec., p. 532, fol. 1284.

John J. Burns, superintendent of transportation for the defendant, testifies as to the joint use and occupation of the yards:

"It would lead to endless contention between the employes of the two companies. It would be impracticable. It would lead to a blockade and stagnation of business and involve endless expense in the way of damage to cars, claims for non-delivery of freight, etc."

As to the use of separate crews of different companies, each doing business for its own employer, but under the subordination of one yard-master, he testified:

Burns' dep. Rec., p. 533, fols. 1286-1288.

"The same confusion would exist because there is only one line or one track leading into several tracks and but one engine can occupy this track at a time. Consequently if the Rock Island engine attempted to occupy it and the Rio Grande attempted to occupy it, there would be a collision. * * * I would consider that it would be very dangerous for both switchmen and all employes working on the road."

Palmer's dep. Rec., p. 627, fols. 1626, 1628, 1629.

A. T. Palmer, superintendent of the Kansas division of the Union Pacific Railway, was interrogated as to the practicability of operating a yard in which the business of two companies was jointly transacted, by having switch engines which would be devoted to the exclusive use of one company's business, and other engines devoted to the exclusive use and service of the other company; to which he answered:

"I would not think it would be a practicable thing to handle; there might be some circumstances in which they could be handled; if a man had the entire charge of hiring and discharging all the men employed in the yard, he might handle it satisfactorily."

The witness did not believe that the yard could be operated successfully even though the movements of the employes were directed by one yardmaster if each com-

pany hired or discharged its ownemployes; that as to a yard in which one set of employes could be used for handling traffic of but one company, he would say: "that would be a case in which it would not be a very successfully operated yard"; that some of the dangers and difficulties would be "turmoil and quarrels and interfering with each other, and in my opinion I don't think you could operate it very successfully or very beneficially."

SEPARATE MOTIVE POWER AND EMPLOYES.

Opinion of experts.

The witness, on cross-examination, declared, "most emphatically," that "assuming that two sets of employes were placed in a yard by two different railway companies who were interested in the operation of the yard, each having its own motive power, and those employes being directed absolutely by one man selected by the two parties, and each company having a right to demand the removal of any employe who was engaged in the yard", —there would be serious difficulty in bringing about a satisfactory operation of the yard.

Palmer's dep. Rec., p. 631, fol. 1646.

He was of opinion, that "it cannot be done and handled successfully by any man in that way, as successfully as it could where one man hired and discharged all the men and carried them on his pay-rolls; that there is not any difficulty in handling the matter if one man can discharge absolutely; if he has the absolute control."

—Rec., p. 632, fols. 1648-1650.

He then admits that a joint operation could be successfully made if the controlling officer had the absolute power to discharge—full power.

—Rec., pp. 634, fol. 1655.

The witness then admitted that from twelve to fourteen railway companies operate trains into and out of the Union depot at Kansas City; all sending their own locomotives upon the tracks, and that each is under the control of its own yardmaster.

—Rec., p. 634, 635, fols. 1658-1666.

The witness then admitted that he had "not much" experience in the operation of joint yards; that he had not had any "in handling the yards particularly;" that "I don't know but what I have seen them operated;" that,

—Rec., p. 638, fols. 1670-1673.

SEPARATE MOTIVE POWER AND EMPLOYES.

Opinions of expert.

"I don't know that I have seen so much as I have heard about those yards being operated;" that "I don't know as I have seen any of them particularly;" that he had observed the "joint operation of the line;" that "I have not had much experience in yards;" that he had been in the train service; that it is "generally conceded by the best practical railroad men that you will not get as good service in handling men in that manner as you would when they were not joint men"; that he don't mean to say "that it is generally conceded it is impracticable to do it"; that "I mean you would not be able to operate it as successfully as you would the other way; that is my experience"; that "perhaps I might not have said experience"; "I should have said 'opinion.'"

Campbell's dep. Rec., pp. 668, 669, fols. 1791-1797.

Alexander Campbell, division superintendent of the Burlington and Missouri River Railroad Company, testified that he did not regard the joint operation of a railway with separate engines and with separate crews to be practicable * * * because it is liable to lead to trouble as between the employes and interfere with the business of the road; that is, with the patrons as well as the road itself; that "and I don't think it can be done practically and economically;" that the fact that the yard was operated under the service of a common yardmaster would not relieve the difficulties "to any great extent;" that "there is a great deal of work to be done in the handling of cars from one track to another, making up of trains, taking out of empties and putting in loads to be unloaded at the wagon tracks or at house tracks or at other tracks as the case may be, at different points throughout the yard;" that "it is very frequent that an engine and crew will take a few cars out of one track and put them on to another, and so on all through the yard."

—Rec., p. 674, 675, fols. 1816, 1817.

When asked if the presence in the Denver yards of Rock Island engines which could not handle Denver cars or business would interfere with the use of the yard, he answered: "It certainly would, yes, unless the yard was divided and each road had a portion of it exclusively for its own business."

SEPARATE MOTIVE POWER AND EMPLOYES.

Opinion of Experts.

On cross-examination the witness said, that he had never in his life seen a freight yard into which more than one company operated its trains with its own motive power and with its own employes; that he never had had any experience in such operation and never had seen a yard so operated by any one; that he had testified to his opinion of it, "of course it is guess-work."

Choate's dep. Rec., p. 590, fol. 1876.

Joseph K. Choate had been a division superintendent on the Union Pacific Railway system; had had "more or less experience—a good many years of it"—and was of opinion, as a railroad man, that the joint use by two companies of a railroad yard with exclusive switch engines and exclusive crews devoted to the separate service of the companies and not subject to the joint use of both, "would be very much against modern practice and very impractical;" that passenger trains are operated into the Union depot on the West Side in Chicago without any serious difficulty; that he had never "been engaged in the operation of a yard jointly with any other company than the one" with which he was connected; that he had never seen a yard operated by two companies, each using its own motive power and its own special employes under the direction of one yardmaster; that the Union Pacific Company tried the experiment of having a joint switching yard under his direction in Denver; that the Argo Smelting Company had operated an engine into the Union Pacific yard at that place under his orders, or "under an understanding they had had previously;" that he succeeded in handling it, but it was always a "menace to safety;" and that he had had no other experience with a joint freight yard.

—Rec., p. 692, 693, fols. 1884-1888.

Derby's dep. Rec., p. 692, 693, fols. 1884-1888.

—Rec., p. 703, fol. 1923.

Orrin A. Derby, a superintendent of the Missouri Pacific Railway, testified for the defendant, that he would say, as yards are usually constructed, they could not be operated successfully by two classes of engines and two classes of employes, one devoted to the exclusive service of one company and the other to the service of the other.

SEPARATE MOTIVE POWER AND EMPLOYEES.

Opinion of experts. Derby's dep.

Rec., pp. 706, 707, fols. 1937-1942.

On cross-examination he stated, that he had had some experience in the operation of yards by two companies, each having its own motive power and employes at South Omaha, Hiawatha, (Kansas), and at Pueblo; that each company did its own work in the yard at that place, but not under the supervision of one yardmaster, and at that place there was "a great deal of delay; whoever got the "tracks held them until they got done;" that if some one had had control, the work would have been divided up more conveniently; that at Hiawatha there was no common yardmaster; if there had been it would have helped matters very much. The agent generally had charge of matters and was usually in his office; that at Pueblo

—Rec., p. 708, fol. 1942

—the "Philadelphia Smelter and Stock Yards are located out on the hill in South Pueblo in the mesa about a mile, I presume about a mile and a half from the outjunction of the Denver, Texas and Fort Worth and some considerable distance from the Santa Fe. The Denver, Texas and Fort Worth and the Atchison, Topeka and Santa Fe and Missouri Pacific have a contract allowing the use of their main track between junction points of these railroads and the Missouri Pacific, Santa Fe, and all of our switch engines go to these points and do work * * *

—that the tracks are subject to the orders of the Denver, Texas and Fort Worth; that the difficulty in operating these tracks consists in the fact that "if there is a string of cars that wants to be handled and the Union Pacific takes an hour or two hours to get their work done, in the meantime the Missouri Pacific engine, if it is there, has to wait until they get through; then it handles the same track, and then the Santa Fe comes and it takes three times instead of only once."

Daley's dep. Rec., p. 1084, fols. 497, 498.

Jeremiah Daly, a yardmaster of the Michigan Southern and Lake Shore railway, at Toledo, Ohio, explains in his deposition, in detail, the operation of a complicated yard at Toledo, by several companies, and in conclusion states that he does not see any reason why the yard at Denver cannot be operated by two companies, "each using its own motive power, its own cars, its own freight

agents and freight handlers; the engines, crews and all their employes engaged in the operation of engines and cars over the tracks being under the direction of one yardmaster, each company having the right to demand the removal of any employe so engaged, without assigning any reason: "the yardmaster having full control and authority of the yard."

SEPARATE MOTIVE POWER AND EMPLOYES.

Opinion of experts. Dalbey's dep.

Rec., p. 1096, fols. 548, 549.

James W. Dalbey, superintendent of terminal facilities of the Missouri Pacific Railway Company at Kansas City, testified that in his judgment "as a railroad man," it would not be practicable for two companies in a yard under 2,000 feet in length and less than 300 feet in width, where in a day of twenty-four hours some fifteen switching engines are used and in which there is but one freight depot for two companies using the yard jointly, to occupy the yard, each company with its own engines doing exclusively the business of the company owning the engines but under the direction of one yardmaster; that "it would be like two women living in one house"; that "it could not be done; they would be fighting before night"; that "somebody's got to be boss, sure".

His attention being called to the plat of the yard at Denver, he was asked, if in his "opinion," it would be feasible for two companies to occupy that plat with their own switch engines, each doing the business of one company, to which he answered, "I would not like the job. I don't think it could be done satisfactorily".

—Rec., p. 1097, fols. 550-552.

On cross-examination he said: "I don't care if there is one boss. Somebody has got to keep dictating to him and he has got to favor somebody; he cannot serve both of them."

—Rec., p. 1098, fol. 553.

Edward Dickinson, general superintendant of the Baltimore and Ohio Railway, Trans-Ohio division, testified, in his judgment such joint operation would be impracticable and attended with danger to life, limb and property.

E. Dickenson's dep.

Rec., p. 1155, fols. 787, 788.

Rec., p. 1159, fol. 805.

Rec., p. 1160, fol. 811.

Rec., 1162, fol. 818.

On cross-examination he defines "impracticable," to mean "very inconvenient, very expensive and very diffi-

SEPARATE MOTIVE POWER AND EMPLOYES.

cult matter to accomplish." In his judgment the supervision of one yardmaster would not "make any difference in the difficulty of operation".

Opinion of experts.

Dunlap's affi.

Dunlap's dep. Rec., pp. 551, 552, fol. 153.

The maximum grade on the road between Limon and Denver is sixty feet.

Charles Dunlap, superintendent of the complainant company, testified that he "has no doubt in his mind that the yards of the Denver and Rio Grande Company at Denver and Burnham can be operated by two companies, each having its own motive power and its own employes, especially when such employes and motive power are directed by one officer selected by both companies, or selected by one and approved by the other, with safety to the property of the parties and to the public and without danger to the lives of those engaged in such employment. He supports his opinion by citing instances of such joint operation on several railways upon which he has been actually employed, during his employment and under his observation.

Allen's affi't. Rec., p. 949, fol. 141.

W. I. Allen, assistent general manager of the complainant company, testifies: "That it is practicable, economical and safe to operate a railroad yard situated as those of the Denver and Rio Grande are at Burnham, Denver, Colorado Springs and Pueblo, by two different companies, each using its own motive power and furnishing its own employes, especially when such motive power and employes act under the direction of one officer appointed jointly by the two companies, or appointed by one with the approval of the other; that he has knowledge of many yards on different roads that have been so operated, some of them by different sets of employes, each acting under the direction of its own superintendent."

Duncan, affi't. Rec., pp. 911, 912, fols. 113, 114.

R. J. Duncan, superintendent of the Colorado division of the Union Pacific Railroad, testifies that he has had twenty-five years experience in the service and operation of railways; that in his judgment railroad yards like the Denver and Rio Grande yard in the city of Denver can be

SEPARATE MOTIVE POWER AND EMPLOYES. *Opinions of experts.*

safely and economically operated with the motive power and employes of two or more railroad companies, provided such employes are under the direction and control of one officer appointed by the joint action of both companies, or appointed by one with the consent of the other; that in the management of a freight yard under the direction of one supervising officer, it would make no difference whether the engines at work on the yard were the property of one or two separate companies or whether the crews were employed by one or two separate companies.

Howard's dep. Rec., pp. 1,199, 1200. fols. 972–975.

Daniel Howard, local freight agent of the Grand Trunk Railway Company, at the city of Chicago, at the request of defendant's counsel, examined the map of the defendant's yard and gave attention to the following question:

"Q. Assuming, Mr. Howard, that two companies, the Denver and Rio Grande and the Rock Island, are obliged to use that yard and all these tracks jointly for their business, what is your opinion as to the practicability of the two companies operating the yard with separate crews and motive power devoted to the exclusive work of the company that hired such crews, with a common yardmaster, who, however, may not call upon the crew of one company to do any of the work of the other company?"

Upon being assured that there was handled in such yard "daily from three to five hundred cars, and that the force that is employed by the present business consists of from nine to ten switching crews all during the day, and four to six switching crews at night," he answered: "the work could be performed, but it would be very expensive, and I should think would lead to clashing between the men."

—Rec., p. 1,205, fols. 996–1003.

On cross-examination he developed the fact, that several different railway companies had moved their own trains over certain tracks of the Chicago and Alton Railway Company in the city of Chicago with their own motive power and their own employes, but under the direction of one pilot for a period of more than ten years, and that the business was being handled in that way at the

SEPARATE MOTIVE POWER AND EMPLOYES. *Opinions of experts.*

time he gave his deposition; that the business was being done in this way for the reason that the Alton Company could make more money out of its trackage than it could by operating the trains of the other companies with its own motive power and employes.

He also developed the further fact, that the Grand Trunk Railway Company, of which he was an employe, operated its trains into its depot in the city of Chicago over the Chicago and Western Indiana Railway, which at the 16th street crossing of Clark street had two main tracks; that six companies operate over those tracks each day, "fully fifty trains, if not more, including light engines" each way, making over a hundred in both directions; and that the following companies operate trains on the tracks which constitute the crossing at the point named: The Lake Shore and Michigan Southern, the Chicago, Rock Island and Pacific, the New York, Chicago and St. Louis, the Chicago and Western Indiana, the Chicago and Western Indiana Belt, the Chicago and Eastern Illinois, the Chicago and Alton, the Chicago and Indiana Coal Company, the Chicago and Grand Trunk, the New Albany and Chicago, the Wabash, the Chicago, Santa Fe and California, the Chicago, Madison and Northern, the Illinois Central and the St. Charles Air Line; and that each operates its own trains with its own motive power under the direction of its own employes.

Howard's dep.—Rec., pp. 1204-1218, fols. 1003-1050.

(3.) General Manager Smith testified that he has refused and will continue to refuse to discharge any employe whose duties pertain to the joint use of the demised property, on the demand of the complainant, unless reasons satisfactory to him are assigned for such demand.

Smith's dep. Rec., p. 806, fol. 2318 *et seq.*

THOS. F. WITHROW,
THOMAS S. WRIGHT,
A. E. PATTISON,

For The Chicago, Rock Island and Pacific Railway Company.

APPENDIX.

The base of this map, consisting of the lines, letters and figures printed in *black*, is a copy of a tracing made in 1884. This with the lines, words and figures in *red* constitute a copy of the map sent by Ricker to Parker, December 21, 1887, produced by R. R. Cable and marked "No. 2." The lines, words and figures in *blue* show the parcels of land conveyed by the several persons whose names are endorsed thereon and which appear in one of the tabular statements on one end of the map; also the main tracks described in one of the tabular statements on the map. The lines in *green* show the "off-hand line" which Mr. Smith testifies he drew on the map, in the presence of Mr. Cable, when the valuation of the property was made. The lines in *yellow* show the outlines of the "proposed yard;" the plat of which bears date "June 13, 1888."

Office Supreme Court, U. S.
FILED.
DEC 14 1891
JAMES H. MCKENNEY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1891.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Complainant and Appellant,
vs.
THE DENVER AND RIO GRANDE RAILROAD COMPANY,
Defendant and Appellee.

APPEAL. No. ~~1695~~ 1095

THE DENVER AND RIO GRANDE RAILROAD COMPANY,
Defendant and Cross-Appellant,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Complainant and Cross-Appellee.

CROSS-APPEAL. No. ~~1741~~ 1109

Appeal and Cross-Appeal from the Circuit Court of the United States for the District of Colorado.

Assignment of Errors by The Denver and Rio Grande Railroad Company, Defendant and Cross-Appellant.

EDWARD O. WOLCOTT,
JOEL F. VAILE,
For The Denver and Rio Grande Railroad Company.

C. J. Kelly, Law Printer, Denver, Colo.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1891.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Complainant and Appellant,
vs.
THE DENVER AND RIO GRANDE RAILROAD COMPANY,
Defendant and Appellee.

APPEAL. No. 1695.

THE DENVER AND RIO GRANDE RAILROAD COMPANY,
Defendant and Cross-Appellant,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Complainant and Cross-Appellee.

CROSS-APPEAL. No. 1711.

Appeal and Cross Appeal from the Circuit Court of the United States for the District of Colorado.

Assignment of Errors by The Denver and Rio Grande Railroad Company, Defendant and Cross-Appellant.

Comes now The Denver and Rio Grande Railroad Company, defendant and cross appellant in cause numbered 1711, above entitled, and says that there was and is manifest error in the record and proceedings of the Circuit Court of the United States for the District of Colorado in said cause, second above entitled, in this, to wit:

1. The Court erred in finding and adjudging that under the provisions of the contract bearing date February 15, 1888, made and entered into between The Denver and Rio Grande Railroad Company, of the one part, and The Chicago, Rock Island and Colorado Railway Company, of the other part, the complainant, The Chicago, Rock Island and Pacific Railway Company, as the successor in interest of said The Chicago, Rock Island and Colorado Railway Company, has the right to operate its trains over the line of the defendant company described in said contract.

2. The Court erred in finding and adjudging that the complainant, under and by virtue of said contract, is entitled to, and has the right, at its option, to employ its *separate* switching crews and operate its own switching engines in the railroad yards of the defendant company.

3. The Court also erred in finding and adjudging that the complainant is also entitled, and has the right, at its option, to handle traffic *with its separate employees*, and to perform any other service which can be performed for it exclusively, including the handling of traffic received from, or delivered to, other railroads by the complainant, to the same extent and as fully in all respects as the defendant may perform like service for itself, and have like use of the joint property for that purpose.

4. The Court erred in finding and adjudging that the complainant should not be excluded from the use of the wye track at Burnham, for the turning of its engines, cars and trains, so long as it should continue to pay for the use thereof, interest at the rate of two and one-half ($2\frac{1}{2}$) per cent per annum, on the cost of its construction, unless and until the *defendant should provide* at Denver another wye track for the turning of such engines, cars and trains.

5. The Court erred in finding and adjudging that the parties should set apart a track at Denver, on which the complainant should have the right to clean its cars, and that if no existing track could be conveniently devoted to that

6. The Court erred in ordering and adjudging that the defendant should pay one-half of all costs taxed, or to be taxed, in said cause.

And because of said several errors, and each of them, the cross-appellant prays this Court to reverse said decree as to said matters, and that a decree in accordance with the law and the facts be entered under the order of this Court.

EDWARD O. WOLCOTT,
JOEL F. VAILE,
For The Denver and Rio Grande Railroad Company.

Supreme Court U. S.
FILED.
DEC 14 1891
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Complainant and Appellant,
vs.
THE DENVER AND RIO GRANDE RAILROAD COMPANY,
Defendant and Appellee.

APPEAL. No. 1095. 1095

THE DENVER AND RIO GRANDE RAILROAD COMPANY,
Defendant and Cross-Appellant,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Complainant and Cross-Appellee.

CROSS-APPEAL. No. 1711. 1109

Appeal and Cross-Appeal from the Circuit Court of the United States, District of Colorado.

ARGUMENT
FOR
THE DENVER AND RIO GRANDE RAILROAD COMPANY.

EDWARD O. WOLCOTT,
JOEL F. VAILE,
For The Denver and Rio Grande Railroad Company.

IN THE

SUPREME COURT OF THE UNITED STATES.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Complainant and Appellant,
vs.
THE DENVER AND RIO GRANDE RAILROAD COMPANY,
Defendant and Appellee.

Appeal. No. 1638.

THE DENVER AND RIO GRANDE RAILROAD COMPANY,
Defendant and Cross-Appellant,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Complainant and Cross-Appellee.

Cross-Appeal. No. 1711.

Appeal and Cross-Appeal to the Supreme Court of the United States from the Circuit Court of the United States for the District of Colorado.

ARGUMENT FOR THE DEFENDANT, APPELLEE AND CROSS-APPELLANT.

EDWARD O. WOLCOTT,
JOEL F. VAILE,
For The Denver and Rio Grande Railroad Company.

GENERAL INDEX.

PAGE.

Brief of Points and Analysis of Argument . . . i–ix

Argument . . . 1–122

Appendix, including

Exhibit A, Map of Railroad Lines between Limon, Denver, Colorado Springs and Pueblo . . . 125

Exhibit B, Map of Denver Terminals . . . 127

Exhibit C, Map of "Shops at Burnham" . . . 129

Exhibit D, Title of Map of Shops at Burnham . . . 131

Exhibit E, Title of Map of Denver Yard . . . 133

Contract of February 15, 1888 . . . 135

Statute of Kansas, relating to Railroad Charters . . . 157

Statute of Colorado, relating to Consolidation of Railroad Companies . . . 157

Statute of Colorado, relating to Leasing Railroads . . . 161

BRIEF OF POINTS AND ANALYSIS OF ACCOMPANYING ARGUMENT.

I.

THE COMPLAINANT IS NOT ENTITLED, NOR HAS IT ANY RIGHT, TO BRING ITS ENGINES, CARS OR TRAINS OVER THE TRACKS OF THE UNION PACIFIC RAILWAY COMPANY INTO OR UPON THE DENVER TERMINALS OF THE DEFENDANT COMPANY.

Page 3.

1. The granting clause of the contract does not alone determine the character, terms or conditions of the use granted.

Page 3.

2. The preceding and subsequent provisions of the contract show limitations of the character and extent of use granted.

Page 5.

(*a*) The Chicago Company's line to which the contract applied was to run via Colorado Springs.

Page 9.

(*b*) Supplies to be furnished by the Denver Company were only for use on the Denver line.

Page 10.

(*c*) The provision for additional tracks for the Chicago Company was to facilitate interchange of traffic with connecting carriers.

Page 11.

(*d*) The rentals were dependent upon a connection at Colorado Springs.

Page 13.

(e) The Chicago Company's covenant as to its corporate power related only to the line to Colorado Springs.

Page 15.

(f) The provision for a special connection at Pueblo excludes any other not mentioned in the contract.

Page 16.

(g) The contract is attached to and cannot be severed from the Chicago Company's railway line.

Page 20.

(h) The Denver Company's terminals are appurtenant to that company's railway alone.

Page 24.

(i) Through business under the contract must pass via Colorado Springs.

Page 26.

(j) The contract was to be operative only upon election of route to Colorado Springs.

Page 28.

(k) The method of compensation for maintenance and operation shows that the terminals were to be used only for business passing over defendant's main line.

Page 33.

3. The situation and condition of the Denver terminals show that the contracting parties intended to use the Denver terminals in connection with the Denver Company's line alone.

Page 38.

4. The use contended for by the complainant would effect an inequality between the two companies.

Page 41.

5. The large expenditures on the main line which the contract required of the defendant are inconsistent with the complainant's contention.

Page 42.

6. Complainant's contention is not aided by the fact that the Chicago Company pays interest on one-half the value of the leased property.

Page 43.

7. The complainant was not admitted to the use of Denver terminals for business brought over Union Pacific tracks, as being entitled thereto under the contract, but was admitted, temporarily, under an outside agreement, upon its distinct promise to pay.

Page 47.

8. There is no inconsistency in the decree.

Page 48.

9. The plaintiff's contention is not aided by any considerations of public policy.

Page 50.

10. The well known relations of terminals to railway lines are inconsistent with complainant's contention.

Page 52.

II.

THE WORDS "SHOPS AT BURNHAM" INCLUDE ALL LANDS AND IMPROVEMENTS SITUATED WEST OF DEFENDANT'S MAIN LINE, EXTENDING FROM THE NORTH LINE OF THE "BURLINGAME TRACT" SOUTHERLY TO VASQUEZ STREET.

Page 55.

1. Even if the excepting clause be disregarded, yet the grant did not, by its terms, convey any interest in the twenty-acre tract, or the Burlingame tract.

Page 55.

(*a*) No lands were granted.

Page 55.

(*b*) The lands in controversy are not *appurtenant* to the property granted.

Page 57.

2. Defendant's maps submitted to the Chicago Company show that these lands were included in the excepted "shops."

Page 60.

(*a*) The shops at Burnham, including all tracks and facilities there used, were no part of Denver *Terminals*.

Page 60.

(*b*) The title of the Burnham map is opposed to complainant's contention.

Page 62.

3. The valuation of the granted premises did not include the shop grounds or any tracks or other improvements thereon.

Page 67.

4. The designation of "Main Tracks" on the map of the "Shops at Burnham" does not aid the appellant.

Page 71.

5. Defendant's tax returns do not aid the appellant.

Page 72.

6. The map of "Proposed Yard" near Burnham does not aid the appellant.

Page 74.

7. The map produced by Mr. Wolcott at Chicago does not aid the plaintiff's contention.

Page 78.

8. The location of the wye at Burnham does not affect the question.

Page 80.

9. The coach track belongs to the shops.

Page 81.

10. The meaning of the word "shops" supports the defendant's contention.

Page 82.

11. The situation of the defendant and of its property at the time of making the contract shows that the entire grounds at Burnham west of the main line were excluded from the contract.

Page 85.

III.

THE COMPLAINANT HAS NO RIGHTS ON DEFENDANT'S RAILWAY AS SUCCESSOR IN INTEREST OF THE CHICAGO COMPANY, UNDER THE CONTRACT OF FEBRUARY 15, 1888.

Page 87.

1. Complainant has no valid paper title.

Page 87.

(a) The lease made by the old Kansas Company did not cover the Chicago Company's line.

Page 90.

(b) The articles of consolidation did not bring the Chicago line under the lease.

Page 94.

2. The defendant is not estopped from denying the complainant's title.

Page 95.

(a) There is no privity between the defendant and the Chicago Company, in regard to the corporate transactions of the latter.

Page 95.

(4) Officers of the defendant recognized complainant only on wrong information given by the latter and by the Chicago Company.

Page 96.

(5) The facts do not in law constitute an estoppel.

Page 98.

IV.

THE COMPLAINANT COMPANY HAS NO RIGHT UNDER THE CONTRACT TO PUT INTO THE DENVER TERMINALS ITS OWN SWITCHING ENGINES, SWITCHING CREWS AND OTHER EMPLOYEES DEVOTED TO ITS EXCLUSIVE SERVICE.

Page 101.

1. The contract does not contemplate such separate service.

Page 101.

2. The prior declarations of the parties agree with defendant's construction of the contract.

Page 103.

3. Separate service is impracticable in the Denver yard.

Page 103.

4. The defendant is not estopped by any past construction given to the contract, especially as to the Denver yard.

Page 112.

5. Traffic must be handled at Denver terminals by joint employees.

Page 113.

V.

THE DENVER COMPANY IS NOT BOUND BY THE CONTRACT TO FURNISH FACILITIES FOR CLEANING COMPLAINANT'S CARS.

Page 114.

1. The subject of car cleaning was entirely outside of the contract.

Page 114.

2. As to track facilities, the contract provides the remedy, and the decree should be reformed.

Page 115.

VI.

THE COMPLAINANT IS NOT ENTITLED TO ANY RELIEF UNDER ITS ALLEGATIONS REGARDING THE FAILURE OF AGENTS AT WAY-STATIONS TO SELL ROCK ISLAND TICKETS.

Page 117.

ARGUMENT

ON BEHALF OF

THE DENVER AND RIO GRANDE RAILROAD CO.

PRELIMINARY STATEMENT.

The Denver and Rio Grande Railroad Company (herein designated as the "Denver Company") and The Chicago, Rock Island and *Colorado* Railway Company (herein designated as the "Chicago Company") entered into a contract under date of February 15, 1888, for the joint use of the Denver Company's railway from Denver to Pueblo (inclusive) upon certain terms, conditions and limitations set forth in the contract. A copy of the contract taken from the Record is reprinted at the end of this argument for convenience of reference.

Soon after the making of the contract, the Chicago Company completed its line to a connection with the Denver Company's line at Colorado Springs, and thereafter for some time operated all its trains *via* Colorado Springs on to and over the Denver Company's line.

In May, 1889, the Rock Island Company, claiming to be the successor in interest of the Chicago Company under the contract, assumed the operation of that company's line, and about the same time made a contract with The Union Pacific Railway Company for trackage rights over the line of the latter company from Limon, Colorado, direct to Denver, and thereafter transacted most of its business to and through Denver over this Union Pacific line, bringing the same over no portion of the Denver Company's line, but at the same time sought to utilize

the Denver Company's terminals at Denver for the handling of this business.

The right of the Rock Island Company to bring this business upon defendant's Denver terminals was at once denied, but the business was admitted there temporarily upon an express promise of the Rock Island Company to pay for the services rendered and facilities used.

No such payment was made; bills therefor were rejected and the Rock Island Company asserted that it had the right to so use these terminals for its business brought over Union Pacific tracks, under the contract made by defendant with the Chicago Company.

The Rock Island Company and defendant being radically opposed in their construction of the contract on this subject, the Denver Company gave notice that it would, on August 1, 1890, exclude from its Denver terminals business brought by the latter company over the Union Pacific tracks. Thereupon, the Rock Island Company filed its bill of complaint in this action and applied to Justice Miller and Judge Hallett, sitting together in the United States Circuit Court for the District of Colorado, for a restraining order, which, upon a brief hearing, was granted by Justice Miller, Judge Hallett dissenting.

By amendments and supplemental bill, there were then brought into the controversy certain other matters of differences which had arisen between the Rock Island Company and the Denver Company.

A cross-bill was filed by the Denver Company which involved an accounting. For the purpose, however, of getting a speedy final decree and an adjudication upon the main points of difference, this cross-bill was, upon the hearing, by the consent of the Court, withdrawn, all matters relating to accounts were stricken from the pleadings, and the

case rests upon the issues formed on the bill—original, amended and supplementary, and the answers thereto.

In this argument, we shall first discuss the principal matters finally adjudicated in the Court below, from which the Rock Island Company appeals, and then we shall take up those elements of the final decree from which the defendant company appeals.

I.

THE COMPLAINANT IS NOT ENTITLED, NOR HAS IT ANY RIGHT TO BRING ITS ENGINES, CARS OR TRAINS OVER THE TRACKS OF THE UNION PACIFIC RAILWAY COMPANY INTO OR UPON THE DENVER TERMINALS OF THE DEFENDANT COMPANY.

This proposition involves the first and principal controversy between complainant and the defendant, and the differences arising therefrom are the immediate occasion of this suit.

The argument upon the proposition will involve the consideration of the First, Second, Third and Fourth alleged errors assigned by the complainant.

The question is discussed in complainant's argument at pages 34 to 75. Pl. Arg. pp. 34-75

We shall discuss this question upon the assumption that the complainant is the legal successor in interest of the Chicago Company named in the contract of February 15, 1888, although the right of the complainant under the contract is denied, and will be the subject of further consideration later in the discussion.

1. *The granting clause does not alone determine the character, terms or conditions of the use granted.* Limitations

The complainant rests its entire claim upon

Limitations.
Rec., p. 12.

what it considers the broad language of the granting clause, to wit Article I., Section 1, of the contract.

We shall not differ with the complainant as to the definition of the words "full" and "equal," but they must be taken with the limitations which the context requires. The grant was "full, equal and joint" for the purposes and to the extent defined in the contract. This extent is disclosed by the various provisions of the contract which follow.

Counsel quote from the opinion of Justice Miller, which was given upon the hearing of an application for a temporary injunction, without the submission of any evidence, and upon a brief argument; and in the quotation Justice Miller uses these words: "Nor do I believe in *any limitation* upon
Rec. p. 85. the right of The Chicago, Rock Island and Pacific Railway Company to use The Denver and Rio Grande Railroad *at all*. Nor is there a limitation upon that right, except that it shall be equal and joint with The Denver and Rio Grande Railroad, and must, of course, be so conducted as to have the regard of these rights as well as its own."

Although quoting this very broad language, counsel immediately, upon the very next page, commences to discuss various limitations that do exist in the
Pl. Arg. p. 38. contract. Says counsel, on page 38: "Certain limitations are expressly stated in other parts of the contract, to which attention will be presently called." And on page 40 the counsel for complainant enu-
Pl. Arg. p. 40. merates various limitations upon the possession and use which are expressed in the contract, thereby recognizing that the terms "full" and "equal," as used in the granting clause, have divers limitations, which are to be found not in the granting clause, but in subsequent parts of the instrument. It is in

the other parts of the instrument, both preceding and following the granting clause, that the defendant finds those clauses which support its contention upon the proposition above announced. Limitations.

The terms of the granting clause itself, however, indicate that it is limited and defined by the subsequent parts of the contract. The entire section is in one sentence, ending with the words "as hereinafter provided." The grammatical construction of the sentence requires that this expression, Rec. p. 12. "as hereinafter provided," should be construed as limiting the principal proposition contained in that sentence, which is found in the granting words in the first line. The various provisions of the contract fully show that it must have been the intention of the parties who drafted the instrument that these words "as hereinafter provided" should control and limit the extent of the grant.

2. *The preceding and subsequent provisions of the contract show limitations of the character and extent of use granted.*

It is a fundamental principle of law in the construction of contracts that the whole instrument shall be considered and taken together, all its parts observed, and the bearing of one part upon another considered, in determining the meaning of any particular part.

The leased premises consisted of a line of railway between and including Denver and South Pueblo, being about 120 miles in length, and including its appurtenant property.

Colorado Springs is a point almost midway between Denver and Pueblo, and is the point of connection specifically designated in the contract at which the Chicago Company's line joins that of the defendant.

After the Chicago Company had made the con-

Limitations.

tract which is the basis of this suit, the complainant made a contract with the Union Pacific Railway Company for the joint use with that company of the Kansas Pacific line from Limon into Denver, and it is claiming the right to use the Denver terminals of the defendant company for business brought thereon over these Union Pacific tracks, the same being business which does not come for any distance whatsoever over the line of the defendant—thereby crowding the Denver terminals of the defendant with business from which it derives no revenue under the method of compensation set forth in the contract.

It is the contention of the defendant that the contract of February 15, 1888, when all its parts are considered, shows that the grant to the Chicago Company was of the full, equal and joint possession and use of the property described *as an entirety*, and not in parts; that the principal thing granted was the right to the use of the main line between Denver and Pueblo; that a right to the enjoyment of the terminals and other connected property is appurtenant only to the use of such main line, and that the business of the Chicago Company under this contract was to come on and depart from this line *by way of Colorado Springs*, with the single exception as to a connection at Pueblo, which will be hereinafter discussed.

(We call the attention of the Court to a diagram appended hereto and marked "Exhibit A," showing the location of this line of railway and the towns of Denver, Colorado Springs, Pueblo and Limon.)

The contract recites, as a basis for the agreement contained therein, as follows:

"The Denver Company owns and operates a railway with appurtenant property, a portion of the

main line of which extends from Denver *through* Limitations.
Colorado Springs to South Pueblo. * * * Rec. p. 12
And the Chicago Company owns a railway which is being constructed from the western boundary of the State of Kansas * * * *to the city of Colorado Springs* above mentioned." (Contract, first recital.)

"The interest of both parties and of the public will be promoted by the establishment and operation of a *through line of railway* between all the points on the line of the railway of the Denver Company Rec. p. 12.
between and including Denver and South Pueblo, and all points on the line of railway which will be operated by the Chicago Company, and on the system of railways of which the Chicago Company will form a part."

After the granting clause, come the following special provisions:

The Denver Company will furnish "all water and Rec. p. 13.
coal which the Chicago Company will need for the operation of its trains *over the railway of the Denver Company*." (Article I., Section 3.)

The Denver Company agrees to "properly and Rec. p. 13.
safely shelter all locomotive engines which said [Chicago] Company may have occasion to use *on the railway of the Denver Company*" (Article I., Section 5.)

Rentals are to be paid by the Chicago Company "from and after the completion of its railway from Rec. p. 14.
the boundary line of the State of Kansas to a connection with the railway of the Denver Company at or near *Colorado Springs*." (Article II., Section 2.)

The Chicago Company covenants that it "has Rec. p. 16.
power to construct, maintain and operate a railway which will extend from the western boundary of the State of Kansas to *Colorado Springs*." (Article II., Section 3.)

"If the Chicago Company shall at any time

Limitations.

Rec. p. 19.

acquire by purchase, construction or otherwise a railway extending not less than fifty miles from Pueblo, it shall have the right to transport persons and property between any point on such line and Denver." (Article III., Section 4.)

"This contract *shall attach to* and *run with* the *railways* of the respective parties. * * * The Chicago Company can assign its interests in this contract only by sale, lease or consolidation of *its own property*." (Article III., Section 9.)

Rec. p. 22.

"If the Denver Company receives through traffic from points beyond Denver or South Pueblo, and hauls the same to *Colorado Springs*, and there delivers it to the Chicago Company, it will receive no greater division of the through rate than it will receive for like traffic delivered at Denver and South Pueblo. And if the Chicago Company hauls through traffic destined to points beyond Denver or South Pueblo to said points instead of delivering it to the Denver Company at *Colorado Springs*, it will receive no larger division of the through rate because of such additional haul." (Article III., Section 4, last clause.)

Rec. p. 23.

"The Chicago Company shall, on or before the first day of April, 1888, notify the Denver Company whether or not it elects to build its line *aforesaid* from said point on the western boundary line of the State of Kansas *to said Colorado Springs*." (Article III., Section 10.)

Rec. p. 27.

"The cost of operating and maintaining all tracks, structures and facilities used jointly by the Denver Company and the Chicago Company shall be apportioned between said companies on a wheelage basis. * * * Said Denver Company shall receive, from the Chicago Company such a portion of the expenses incurred by the Denver Company in operating and maintaining the railway between Denver and Pueblo * * * which shall be as the entire wheelage of the Chicago Company is to the entire wheelage on said railway between Denver and Pueblo." (Article II., Section 2, eleventh clause.)

(a) *The Chicago Company's line to which the contract applies was to run via Colorado Springs.* Limitations Route.

The recitals which precede Article I. and follow the word "witnesseth" show the situation of affairs and the inducements which led each party to enter into the contract, to wit: Rec. p. 12

1st. The Denver Company had a line which extended from Denver *through Colorado Springs* to South Pueblo.

2d. That the Chicago Company owned a railroad, then being constructed from the western boundary of Kansas *to the city of Colorado Springs.*

3d. That the interests of both parties and of the public would be promoted by a *through* line of railway between the points on the one line and the points on the other.

We think it is beyond question that the *through* line here contemplated was a *through* line *via Colorado Springs* to and from points on that line, which was then being constructed from the western boundary of the State of Kansas to the said city of Colorado Springs, and to and from points east of the eastern terminus of that line on railways with which it should connect.

These premises thus recited are expressly stated to be the consideration upon which the agreement is based. Rec. p. 12.

The numerous clauses which follow the granting clause throughout the contract, some of which are above quoted, indicate in like manner the intention of the parties, that the connection between the railways should be at *Colorado Springs*, and that the use to be made of the defendant's line by the Chicago Company had as its principal element, to which all others were merely appurtenant, the *use of its main line.*

Limitations.

Supplies.

(b) Supplies to be furnished by Denver Company were only for use on Denver line.

Article I., Section 3, requires the Denver Company to furnish "all water and coal which the Chicago Company will need for the operation of its trains *over the railway of the Denver Company*," and Section 5 of the same article provides for engine houses "to properly and safely shelter all locomotive engines, which said [Chicago] company may have occasion to use *on the railway of the Denver Company*."

Rec. p. 13.

The compensation for the water supplied under the clause above quoted was to be paid on the basis of wheelage, which, under Article II., Section 2, 11th clause, is determined by the relative wheelage of the two companies on the line between Denver and Pueblo. This frequent reference to the "railway of the Denver Company," described as extending from Denver to Pueblo, is inconsistent with the theory that the largest part, or even any part, of the Chicago Company's business should be brought on to the Denver terminals over other routes, thereby adding heavily to the terminal burdens without passing over a mile of the Denver Company's line, on which line alone compensation for use is to be computed.

Rec. p. 16.

Complainant's argument on this subject is remarkable. Counsel say (page 37): "Why this limitation to the 'railway of the Denver Company,' if it was understood at the time that the Chicago Company would operate *no other*? This limitation implies that it was understood by the parties at the time that the Chicago Company, or its successor, might operate trains over railways *other* than that which was being *covered by the terms of the lease*."

Pl. Arg. p. 37.

See also complainant's argument, page 54.

Pl. Arg. p. 54.

Undoubtedly, but the other railway so to be

operated was the Chicago Company's line extending from the west boundary of Kansas *to Colorado Springs.* The leased premises consisted of the Denver Company's line between Denver and Pueblo. Not only was it understood that the Chicago Company would, but it was in duty bound to operate its own line to and from Colorado Springs. That was a condition forming the very basis of the agreement, without which the contract would never have been made. Limitations. Supplies.

Under this contract the Chicago Company's engines would move over the 100 miles of the Chicago Company's line extending east from Colorado Springs, and also over the defendant's line of 120 miles between Denver and Pueblo. The defendant was to furnish coal and water and shelter for engines moved over its own railway, leaving the Chicago Company to its own resources for like supplies and conveniences east of Colorado Springs.

But one deduction can be drawn from these expressions, and that is that the contracting parties contemplated that the Chicago Company's traffic would pass *over the railway* of the defendant company.

(c) *The provision for additional tracks for the Chicago Company was to facilitate interchange of traffic with connecting carriers.* Additional Tracks.

In this connection, counsel for complainant discuss the provisions of Article III, Section 1, providing for additional construction, for the benefit of the Chicago Company, of "side, spur and other tracks * * * connecting any track described in Article I, Section 1, with *its own* tracks, or with the tracks of any *other railroad company*, or to any industry". See p. 17.

It will hereafter appear more fully that the "connection" and use complained of by defend-

Limitations.

ant is not a connection with or use of the Chicago Company's "*own* tracks."

But counsel say:

Pl. Arg. p. 37.

"It was not needed to provide for a connection at Colorado Springs, as provision was elsewhere made for that. The connections contemplated were to be elsewhere, and why should the Chicago Company desire connections elsewhere, if its railway was to connect with that of the Denver Company only at Colorado Springs?"

Additional Tracks.

Counsel for the complainant are not affected with an excess of candor. While *a* connection had been provided for and required at Colorado Springs, yet it might well be that after connections made, additional connections by side tracks, double tracks, etc., might be there required, as was, in fact, the case, extensive yard changes being made at Colorado Springs to accommodate the connections at that point. Moreover, the contract contemplated the transaction of through business by the Chicago Company. It might, for the accommodation of this business, require a connection with an "other railway" at Colorado Springs. It did require and obtain a connection with The Colorado Midland Railway Company.

It might require new connections at Pueblo with the lines going west. It might require, at Denver new connections with railways running north or west, for purposes of transfer to other carriers. Adequate facilities of this character were essential to the interchange of traffic with connecting lines. This is "why" the Chicago Company might "desire connections elsewhere" than at Colorado Springs.

This provision was manifestly inserted in the contract so as to give the Chicago Company ample opportunities to carry *through*, and even *transcontinental* traffic *via* Colorado Springs to and from connecting lines extending westward from Denver.

Colorado Springs and Pueblo; its only object was to facilitate interchange of traffic with connecting lines; and to give convenient access to industries as sources of traffic. Such provision was necessary to effectuate another provision in Article III., Section 11, which reads: "This contract is intended to permit either party hereto to exchange business with other companies in car-load lots or otherwise; and, in the ordinary exchange of business, in the cars of such other companies" Limitations. Rec. p. 23.

(d) *The rentals were dependent upon a connection at Colorado Springs.* Rentals.

Article II., Section 2, provides for the payment of rentals from and after the completion of the Chicago Company's railway to Colorado Springs, and the tenth clause of the same section provides as follows: Rec. p. 14.

"No compensation will accrue or be paid to the Denver Company, from or by the Chicago Company, for the use and occupation of said premises, before the railway of the Chicago company shall be completed from its initial point, on the western boundary of the State of Kansas, to a connection with the railway of the Denver Company, within the time hereinafter specified."

The Chicago Company could have accomplished its purpose of bringing cars on to defendant's line, by a Denver connection alone, over the tracks of the Union Pacific Company. The physical connection at Colorado Springs was not essential to the enjoyment premises leased, if a connection at Den- [illegible] been permitted by the contract.

The Kansas Pacific (owned by The Union Pacific Railway Company) had long been constructed and in operation from Limon to Denver. The complainant could have saved the entire expense of building from Limon to Colorado Springs and brought all its traffic—as it now does the most of it—direct over

Limitations. Rentals.

the Kansas Pacific line, from Limon to Denver and thence on to the tracks of the defendant company, if such method had been permitted by the contract.

It will be observed that this contract was to be in force upon the approval of the same by a vote of the stockholders of both companies, provided the election, hereinbefore mentioned, was made on or before the 1st day of April, 1888. That election was made within the time limited and the contract was ratified by the stockholders on the 22d and 29th days of May, 1888.

Rec. p. 23.

Rec. p. 273. Rec. p. 128.

The Chicago Company had the right to occupy the premises for the purposes contemplated in the contract, at any time after May 29, 1888. It was not required, however, to complete this connection at Colorado Springs until December 31, 1889, nearly two years after the making of the contract. A connection, however, from the existing Kansas Pacific track, from Limon to Denver, could be very speedily made. The complainant did, in fact, make a contract with the Union Pacific and occupy that line and bring traffic to Denver by that route, before the end of May, 1880.

Suppose that it had delayed the completion of the line to Colorado Springs until December, 1889, as it was at perfect liberty to do, could it, in the meanwhile, occupy the Denver terminals of the defendant for the business which it was bringing from Limon over Union Pacific tracks—from and after May, 1880?

It could if the contention of the complainant is to be sustained, for it had an existing valid contract, by which it became lessee of defendant's railway, including these terminals.

But the contract in the clause above quoted expressly provides that no *compensation* shall be paid until the Chicago Company completes its line to a

connection with the Denver line; and this clause, taken in connection with the first clause in Section 2, Article II., shows clearly that the connection must be at Colorado Springs. Limitations Rentals.

Under the complainant's construction of this contract, then, that company might have occupied the defendant's Denver terminals for its Union Pacific traffic, from May to December, 1889, without paying a dollar of compensation for the service rendered or facilities used.

It will not do to say, in answer to this, that the tenth clause of Section 2, Article III., above quoted, would be satisfied by the connection which the Rock Island Company made at Denver, over Union Pacific tracks, and that compensation would, under that clause, commence upon the making of such a connection, because the express provision of the contract is that compensation shall be delayed until the Chicago Company's line is completed to the connection named, and that connection, as already frequently urged, was to be at Colorado Springs and not elsewhere.

(c) *The Chicago Company's covenant as to its corporate power related only to the line to Colorado Springs.* Corporate Power.

This covenant is found in Section 3, Article II.

Why should the Chicago Company covenant that it had power to construct a line to extend from the western boundary of the State of Kansas to Colorado Springs, unless the connection at that point was an essential element in the agreement, and why was Colorado Springs mentioned, rather than Denver, if it was contemplated that there should be a connection at both points? Rec. p. 17.

The frequent mention of the one place as a terminus, and the absolute failure to make any sug-

Limitations.

gestion of a connection at Denver, show clearly that the one connection, only, was contemplated.

Pueblo connections.

(f.) *The provision for a special connection at Pueblo excludes any other not mentioned in the contract.*

In Article III., Section 4, there is a clause which expressly shows that it was not the intention of the parties that the Chicago Company should connect with the Denver Company's lines except at the places specifically mentioned in the contract. That clause reads as follows:

Rec. p. 19.

"But it [the Chicago Company] shall have the right to transport persons and property between stations on its railway and connecting lines and all points between and including Denver and South Pueblo: *Provided, however*, That if the Chicago Company shall at any time acquire by construction, purchase or otherwise, *a railway extending not less than fifty miles from Pueblo*, it shall have the right to transport persons and property between any point on such line and Denver."

The contract had already provided for a connection at Colorado Springs. Here is a proviso that it may also connect at Pueblo, if it should acquire, by construction, purchase or otherwise, a railway extending not less than fifty miles therefrom.

Expressio unius est exclusio alterius, is an ancient maxim of the law which applies here with full force, and the specific statement in this contract of the privilege to the Chicago Company to make this connection at Pueblo necessarily excludes the idea that it may make a like connection at any other point, and especially at Denver. Pueblo is one terminal of the line described in the contract: Denver is the other terminal. By the acquisition of rights over the Union Pacific line from Limon to Denver, the complainant has acquired a railway ex-

tending not less than fifty miles from *Denver*, and it is seeking, by that line, to bring its traffic on to the defendant's line *at Denver*. The clause of the contract above recited as effectively prohibits a connection at Denver as if it were in express words so stated in the instrument. Limitations. Pueblo connections.

The learned counsel for complainant say:

"This special provision was incorporated in the contract *because* there was in the vicinity of Pueblo large deposits of coal and other mineral for which Denver was a desirable market." Pl. Arg. p. 51.

The proposition as to *cause* and as to *Denver market* rests in argument and not in evidence.

The fact only of such mineral deposit appears in evidence, and coupled with it is the fact that within the same radius of Denver were extensive coal fields and other sources of traffic then developed. Rec. p. 755, fol. 281.

Counsel for complainant make an ingenious argument on this subject at page 50, resting on an alleged difference between the line from Denver to Limon and the permitted line to extend from Pueblo, in this: That the former is a "connecting line" and belongs to the system of which the Chicago Company's line was to form a part, while the permitted line from Pueblo would not be a connecting line or a part of said system. Pl. Arg. p. 50.

This brings us to the consideration of what is meant by "connecting lines," as used in the section above quoted, and what, in the contemplation of the parties, was meant by "the system of railways of which the Chicago Company will form a part," as used in the early recitals of the contract.

We assume, for the purpose of the argument, that it is true, as vehemently contended by complainant, that it was in the contemplation of the parties that the Chicago Company's line would Pl. Arg. p. 5.

Limitations

Pueblo connections.

ultimately become incorporated into the system controlled by the complainant, The Chicago, Rock Island and Pacific Railway Company.

Cable Affi. Rec. p. 887

What was that system? It extended from Chicago westward, with divers ramifications through Illinois, Iowa, Missouri and Kansas, but not west of Kansas. The Chicago, Kansas and Nebraska Railway, as part of the system, was to and did extend to the western boundary of Kansas. This was the farthest point westward then reached by the system.

Rec. p. 177, fol. 70.

The Chicago Company was organized for the express purpose of *connecting* with this system of railways at the western boundary of Kansas.

Rec. p. 12

The contract is based on the premise that the Chicago Company's line will "connect" with the Chicago, Kansas and Nebraska Railway Company at the western boundary of Kansas, and run thence to Colorado Springs.

By this system so described, and by the construction so provided for, the Chicago Company would have "connection" with Eastern lines, and such connection would enable business to and from the East to pass over the Chicago Company's line on to the defendant's line *via* Colorado Springs, and to be transported to and from the West via Denver or Pueblo.

When we consider the situation of the parties and the relations of these railway lines, the only reasonable conclusion as to the connections meant must be connections by which traffic to and from the East would go over the lines mentioned in the contract.

The complainant, however, would satisfy the contract by a mere physical connection or intersection of tracks, or, at most, by a *western* connection at Limon, claiming that under this contract it can carry all its traffic to and from the East via Denver

and Limon, on the theory of a *connection* at Limon, claiming, under the contract, the use of the defendant's terminals for this business, and yet carrying it over no portion of defendant's line. Limitations. Pueblo connections.

In view of the premises on which this contract is based, is it not manifest that the connections of the Chicago Company referred to are connections by which the business of the Rock Island system would be brought *to* the leased premises rather than a connection which diverts that business elsewhere? Colorado Springs is definitely fixed in the contract as the western terminus of the Chicago Company's line and as the point of connection of that line with the defendant's line. By observing the map appended hereto (Exhibit A), the relative position of places is seen. Limon is seventy-four miles northeast of Colorado Springs; it is ninety miles southeast of Denver.

In any traffic sense, or in any sense consistent with this contract, can the Denver-Limon line be considered a connecting line as regards business or traffic to or from Colorado Springs? Manifestly not, as its whole effect must be to *divert business from* Colorado Springs; and yet, the contract contemplated a through line which should pass through Colorado Springs.

But complainant's contention that a "railway extending not less than fifty miles from Pueblo" would not be a connecting line within its (the complainant's) construction of that term, is not sustained by the contract.

Such line must be fifty miles or more in length Rec. p. 72. before it comes within the terms of the proviso. Its direction is not designated. It may go northeasterly to a physical connection with the Chicago Company's line at Limon or some other point in Eastern Colorado. If so, it would be situated in reference

Limitations.

to Pueblo, one terminal of the Denver line, exactly as the present Limon line is in reference to Denver, the other terminal.

The connection so made would not be such a connection as the contract contemplates in using that word, for the reasons already assigned; but such line would, nevertheless, be protected by the proviso. The Chicago Company could not carry over it, via Pueblo, to intermediate points on defendant's line. That can only be by way of Colorado Springs. But it could bring traffic from the East via Pueblo to Denver, and the Denver Company would receive the benefit of the wheelage for the full length of the leased line.

The contract, then, only provides two possible places of connection of the Chicago Company's line with that of the defendant: 1st. At Colorado Springs, where connection is not only permitted, but required. 2d. At Pueblo, which can be only upon specific conditions and with specific limitations.

The Court below well says on this subject that this clause "plainly shows that it was not the intention of the parties that the Chicago Company should connect with the Denver Company's line, except at the places specifically mentioned in the contract."

Rec., p. 325.

Contract not severable from Chicago road.

(g) *The contract is attached to and cannot be severed from the Chicago Company's railway line.*

Article III., Section 9 (1st paragraph), is, in our opinion, in itself conclusive upon the question under discussion. It reads:

"This contract shall *attach to and run with the railways of the respective parties* during the corporate existence of each and all extensions of such existence, by renewal or otherwise, and shall be binding upon the lessee, assigns, grantees and successors of each, during the continuance of their several corporate existences; *Provided, however*, That the Chicago Company can assign its interest in this

Rec., p. 22.

contract *only by sale, lease or consolidation of its own property.*" Limitations.

The reciprocal provisions at the beginning and end of this paragraph make the obligations and privileges of the contract inseparable from the Chicago Company's line described in the contract. The contract attached to that line, runs with it, and cannot be transferred, except in connection with, and as an incident to the use of, that line. Contract not severable from Chicago road.

But what is the complainant attempting to do? It claims rights under this contract as lessee of the Chicago Company's line. Assuming the validity of this lease, its enjoyment of these rights as incident to the Chicago Company's line cannot be disputed; but, being the lessee of this line, it then, by a separate and independent contract with another company, becomes also a lessee of the Union Pacific line from Limon to Denver. It then attempts to transfer the benefits of this contract from the line to which alone it pertains, and to attach these benefits to the Union Pacific line, which it holds under another lease; and this it does against the will and greatly to the prejudice of the other party to this contract, to wit: the Denver Company.

It is to be observed that the *Chicago Company* has never built or acquired a line from Limon to Denver, neither has its successor by consolidation, The Chicago, Kansas and Nebraska Railway Company. But the Rock Island Company, as a lessee of both lines, severs from the one and gives to the other that which the contract strictly confined to the line described therein.

While this clause of the contract permits an assignment thereof *by a lease* of the Chicago Company's line, yet it does not permit the severance of the contract from that line and the attachment of it to some other line which such lessee may control.

Limitations.

Contract not severable from Chicago road.

Pl. Arg. p. 57

The purpose of this clause of the contract was undoubtedly, as counsel for the complainant well, though perhaps inadvertently, say, to make each provision "*a part of the property.*" But this contract was not, and could not become, without the consent of the defendant, a *part* of *some other property*. Being a part of the property described in the contract, to wit, the line from Colorado Springs east, it could not be taken therefrom and made to attach to the other line, extending east from Denver.

Pullman Co. vs. Mo. Pac. etc., 115 U. S., 595

The rights of a lessee, in the absence of any new contract, cannot be higher than those of a successor by consolidation, and the principles announced by this Court in Pullman Car Company vs. Missouri Pacific Railway Company, 115 U. S., 595, become pertinent. There it was held that the Pullman contract with the old company did not cover the new roads taken in by the consolidation. So in this case, adapting the language of the decision, the defendant company did not bind itself to give the benefits of this contract on all roads which a lessee of the Chicago Company might from time to time itself control, but only on the line controlled by the Chicago Company.

This attempt on the part of the complainant to extend to its Denver-Limon line, held by lease from the Union Pacific, the rights it holds as a lessee of the Chicago Company's line presents a controversy very similar to that in the case of the Lancashire and Yorkshire Railway Company vs. the East Lancashire Railway Company, in which the Court uses the following language:

L. & Y. Ry. vs. E. L. Ry., 2 Eng. R. and C. cases 810

"Then we arrive at the second question: To what railway does the agreement extend? It appears quite clear that, at the time when the agreement was made, the question admitted of no reasonable doubt. The traffic of the Manchester, Bury and Rossendale line could alone have been then contem-

plated, for there was no other, and the nature of the agreement itself strongly tends to show that it must have been so limited, for it was an agreement to give accommodation at the Salford station to the traffic of the projected railway. Now, that accommodation is of necessity limited by the station itself. It is one thing to accommodate traffic arising on a railway of fourteen miles, and quite another thing to do the same for a more extended, and, indeed, as here contended for, an indefinitely extended railway. Unless, therefore, we find an express extension of this agreement to the traffic of the present railways, we ought not to hold it as so extended. It is clear to us that the accommodation given must have been limited, and, unless we stop at the railway existing, we can find no limit whatever.

Limitations.

Contract not severable from Chicago road.

"Now, looking to the different acts of Parliament whereby the original Manchester, Bury and Rossendale Railway has been extended and incorporated with others, till at length it has become the aggregate now called 'The East Lancashire Railway,' we do not find provisions extending and at the same time limiting this accommodation. We think that these provisions amount to no more than this: That the agreement has been made applicable to those other railways, although they were not the parties who made the original contract, but that, in its terms, *it remains as limited as before.* They are entitled to all the provisions and benefits quite as much as if they had been the original contracting parties to it. But the contract itself remains as before. If they wish the traffic beginning on these lines, and passing over the original Manchester, Bury and Rossendale Railway, and from it over the railway extending from the point of junction to the Salford station, or over any part thereof, to pass at the rates provided for by this agreement, they cannot do so without a fresh and additional agreement to that effect. * * * But the extension of the railway itself would, we think, clearly not be within the original agreement, for such additional traffic is really quite unlimited in its nature and extent, and it is clear that the agreement was for a limited accommodation only."

Limitations.

Lancashire and Yorkshire Railway Company vs. East Lancashire Railway Company, 6 Eng. Railway and Canal Cases, 816.

These remarks are particularly applicable to the case at bar. The contract now under consideration related to the line which was to bring business to or from eastern connections to or through Colorado Springs. That was the traffic contemplated by the parties, and that portion of it which would come onto the Denver terminals would also pass over the Denver company's tracks between Denver and Colorado Springs.

Appurtenant to Denver Line.

(b) The Denver Company's terminals are appurtenant to that company's railway alone.

In this connection, we ask the attention of the Court again to the grant and the grantee. The grantee is the Chicago Company, as the owner of a line being constructed and to be completed from the western boundary of Kansas to Colorado Springs. The grant is of the Denver Company's railway and appurtenant property extending from Denver to Pueblo inclusive, through Colorado Springs.

We think it is an undeniable proposition that in the leasings of a railway 120 miles in length with appurtenant property, the principal element in the consideration of the parties is the railway line, itself, being the main line for transportation from one point to another, and that all terminal facilities are merely appurtenant, being constructed or acquired for the accommodation of the business so moving over the main line and as a mere facility for the proper disposition of that business. The object of railroad business is the carrying of persons and property from one point to another. Terminals are accessories, intended for the more convenient disposition of cars and traffic so moved from one point to another; and in the absence of express provisions

to the contrary, terminals, like other appurtenant property, must be considered as relating solely to the main thing granted, to wit: the line of railway. The thing granted in this contract being the railway, and not the terminals as such, and the terminals passing only as a part of that railway, or as property appurtenant thereto, we think it is undeniable that no *separate* use of the terminals was granted, but a use only in connection with the railway described in the grant.

Limitations.

Appurtenant to Denver line.

Under the contention of the complainant, the defendant's terminals at Denver are separated from the main thing granted and made appurtenant to other railway lines and railway systems. In the particular matter in controversy, they are made appurtenant to and a facility for the accommodation of a line ninety miles in length, extending from Limon to Denver, which is not any part of the granted premises at all, nor in any manner mentioned in the contract.

If the complainant can, by the acquisition of the line from Limon to Denver, so transfer to that line the use of the defendant's Denver terminals, then it may, in like manner and upon the same principle, by purchase or other acquisition of the Union Pacific system of tracks, crowd the Denver terminals of the defendant with all the business of that system. It may, if it procures trackage on the Atchison, Topeka and Santa Fe system, crowd the Denver terminals of the defendant with the business of that system, and there is no limit to the extent to which property acquired and used as strictly appurtenant to and as a facility for the defendant's line of railway may be diverted from such uses and made appurtenant to and facilities for other systems of railway. We respectfully insist that such a construction of the contract would be an outrage upon its whole spirit and

Limitations.

intent and a violation of well recognized relations which terminal properties bear to the lines of railway to which they belong.

Through business. Reasons.

(c) *Through business under the contract must pass via Colorado Springs.*

The provision which is made for division of joint rates on through traffic gives additional support to the defendant's contention.

By reference to the attached map (Exhibit A), it will be seen that the Chicago Company, in bringing through traffic to the West via Colorado Springs, could send it in any one of three different ways: Either by a line which connects directly at Colorado Springs, being the Colorado Midland Railway, and runs thence west to Leadville, and ultimately by connecting lines to the Pacific coast; or via Colorado Springs to Denver, at which point it would be delivered to the Union Pacific system, whence it would be carried west, or north by way of Cheyenne to the Pacific coast; or via Colorado Springs to Pueblo, and thence by the residue of the Denver and Rio Grande Railroad southward, or westward to the Pacific coast or, of course, to intermediate points.

In the same way, property received on the Denver and Rio Grande Railroad, being through traffic from the West to the East routed via the Rock Island system, could be received from the Union Pacific at Denver, at which point it would be delivered by the connecting line either to the Chicago Company or the defendant, carried thence to Colorado Springs, from which point the Chicago Company would carry it east; or, if it came by the more southern route over the Denver and Rio Grande to Pueblo, at that point it could either be delivered to the Chicago Company, or be carried by the defendant to Colorado Springs and there

be delivered to the Chicago Company, to be by it carried eastward. Limitations. Through business.

The provision of the contract in Article III., Section 4, in the last paragraph, to the effect that no difference between the hauls made by the parties respectively on the railway of the Denver Company between Denver and Pueblo, should be considered, whichever one should haul *to or from Colorado Springs*, is absolutely inconsistent with the idea that the Chicago Company was permitted under the contract to haul cars to Denver by an independent route, or to take traffic by way of Denver for eastern business, and even less is it consistent with the idea that the Chicago Company should have the right to carry its traffic by way of Limon and Denver, using the Denver terminals of the defendant company in the handling of the business, and then delivering the traffic to the Union Pacific Company for transit west, giving the defendant no benefit or any proportion whatsoever of the through rate or of wheelage. Rec. p. 20.

The only comment made by the learned counsel for the complainant on this subject is that it is "a traffic arrangement entirely outside of the general scope of the contract," * * * "It was a traffic arrangement, purely and was no part of the lease proper." Pl. Arg. p. 57.

It will be observed that this is not a separate article or even section of the contract; that it is incorporated among the various limitations upon the Chicago Company's use of the leased premises set forth in Section 4 of Article III. It therefore becomes an essential part of the contract which governs the extent and character of the grant, and its language clearly reveals that in the making of the contract both parties were considering that through business of the Chicago Company, or its

Limitations. Through business.

successors, under the contract would pass through Colorado Springs; and yet, under complainant's contention, other business, in which, for example, the Rock Island and Union Pacific are connecting carriers, may be transferred to or from the Denver-Limon line at Denver, and defendant's Denver terminals be utilized for shifting cars and the making up of trains, and yet the Denver Company get no benefit of the business whatsoever.

Election.

(*f*) *The contract was to be operative only upon election of route to Colorado Springs.*

The contract provides:

Rec. p. 25

"The Chicago Company shall, on or before the first day of April, in the year 1888, notify the Denver Company whether or not it elects to build its line aforesaid from said point on the western boundary line of the State of Kansas to the city of Colorado Springs. If it shall elect to build said line, it agrees to complete the same and to occupy the line of the defendant company and to be bound by the terms of this contract, on or before the 31st day of December, in the year 1889. If it shall elect not to build said line, this contract shall on said 1st day of April in the year 1888, become void and of no effect."

This contract then, was not operative from the date of signing it, but whether it was ever to become operative depended on an election to be made by the Chicago Company. That election was as to the building of its line to Colorado Springs, and in the event of such election, it bound itself to complete its line to Colorado Springs within the given time and *occupy* the Denver Company's line. This election and occupancy go together, and without them there was to be no contract. In the connection here used an occupancy by way of Colorado Springs is the only one that can be legitimately deduced.

Under the circumstances of this case, parol evidence is admissible to show the real intention

and meaning of the parties at the time the contract was made. Mr. Justice Miller upon the circuit has announced a rule in reference to parol evidence, as follows: Limitations. Election.

"When the instrument does not suggest what the meaning of the parties was and when the language is susceptible of more than one meaning, and it is uncertain which is the proper construction, parol testimony is admitted to show all the circumstances such as the relations of the parties and their knowledge of the subject-matter of the contract, the state and condition thereof and all other facts which shed any light on their intentions or meaning." Phelps vs. Clasen, 1 Woolw., 212.

Phelps vs. Clasen, 1 Woolworth, 212.

We also ask the attention of the Court to the following authorities: Bradley vs. Packet Co., 13 Pet., 89.

Bradley vs. W. A. and G. Steam Packet Co., 13 Peters, 89.

United States vs. Peck, 102 U. S., 64. U. S. vs. Peck, 102 U. S. 64

The relations of the parties to this contract, their knowledge of the subject-matter of the contract and the state and condition thereof, are material to the consideration of the clause of the contract now under construction.

Prior to entering into this contract, the Chicago Company, by its articles of incorporation, had power to build into Colorado from the east to any one or all of three termini, to wit: Denver, Colorado Springs and Pueblo. The selection of the western terminus would determine whether this contract should go into effect; the question of selection of route was a subject for consideration directly involving the situation of the parties at the time of the negotiations. In view of this fact, the question of time within which a selection should be made was discussed and such limit of time expressed in the contract. The Chicago Company was already building its line into Colorado from the east, as shown in the recitals of the Rec. p. 177

Limitations.
Election.

contract itself. The situation then of the parties was this: That the Chicago Company had determined to build, and was building westwardly in Colorado. A question was under consideration as to the route which they should choose in the further building to the west. It was not a question as to whether they should build at all, but as to the route they should choose.

The parties to the negotiations, and the men whose statements show the situation of the case, were Mr. Cable, the President of the complainant company and also President of the Chicago Company; Mr. Moffat, President of the defendant company, Mr. Smith, General Manager, and Mr. Wolcott, General Counsel of the Denver Company.

Mr. Cable stated to Mr. Wolcott that they (meaning the Company represented by him) "had not fully determined as to whether the terminus of
Rec. p. 34. a road they intended to construct into Colorado to connect at the Kansas line with the Chicago, Kansas and Nebraska Railway Company should be at Colorado Springs or not, but that it was thought such terminus would be at Colorado Springs."

Mr. Cable, "desired that a clause should be inserted giving the company which he represented a certain period of time in which to determine whether or not such company would enter into contractual relations with the Denver and Rio Grande Railroad Company."

He said to Mr. Wolcott "That time was required, in order that," as Mr. Cable expressed it, "our folks" or "our people" could determine whether they desired to build a line to Colorado Springs and from thence reaching Denver and Pueblo over the line of the Denver and Rio Grande Railroad Company under the proposed

contract, *or* whether they should determine to build an independent line from the Kansas line to Denver, with a branch to Pueblo, in which latter contingency they would not desire to make any contract with the Denver and Rio Grande Railroad Company." Limitations. Election. Rec. p. 941.

Mr. Moffat's evidence is to the same general effect. Rec. p. 934-5.

General Manager Smith, when asked if there were any conversations as to the method by which the proposed Rock Island line would come into Denver, answers:

"Yes, sir, they were to come into Denver by way of Colorado Springs." Rec. p. 746.

And when asked to state the substance of the conversations upon the subject of election, he answers:

"To state it just briefly, they had no idea whatever of building the other road, but they were coming in by way of Colorado Springs. That was the substance of it and about all of it." Rec. p. 747.

Later on, the same witness, speaking of Mr. Cable's statements, said:

"Well, in a general way, he said at various times that he expected to do a very large business and *bring all of his traffic* over that line, and thereby increase the wheelage so that it would amount probably to as much as our own business." Rec. p. 768.

Speaking again of the time given within which election should be made, the witness was asked what reason, if any, was given by Mr. Cable, in speaking upon that subject. The witness answered,

"It was a fact, and he was to decide at that time whether they would build an independent road into Denver *or* avail themselves of the Rio Grande line." Rec. p. 779.

On cross-examination, this witness says:

"Mr. Cable said that *all their business* from the east would come over that line and be delivered Rec. p. 842.

Limitations. Election.

to us *at Colorado Springs*." * * * "I was given to understand that the entire business that the Rock Island Company and those other companies could control for Denver and points west would be brought to the line of the Denver Company *at Colorado Springs*."

Again the witness says:

Rec. p. 543.

"He (Mr. Cable) did always take pains to give me to understand that all of the business of the Rock Island or the other companies in which he was interested would be delivered on the lines of the Rio Grande *at Colorado Springs*, and be taken to Denver and other points by Rock Island trains, thereby increasing their wheelage."

Rec. p. 5[illegible].

The only contradiction to this testimony of Messrs. Wolcott, Moffat and Smith is found in the testimony of Mr. Cable by his affidavit found in the printed record at page 887 and following.

The evidence here cited explains the situation of the parties, which prompted the insertion into the contract of this clause, giving a time within which the Chicago Company should elect whether or not it would build to Colorado Springs, and explains the propriety and the form of the notice of such election subsequently given.

That notice is set forth in the complainant's bill of complaint. Its language is worthy special notice. It reads as follows:

CHICAGO, March 17, 1888.

To The Denver and Rio Grande Railroad Company:

Rec. p. 26.

"You are hereby notified that the Chicago, Rock Island and Colorado Railway Company elects, as provided by the contract of February 15, 1888, to build *its railway* from the western boundary of the State of Kansas *to Colorado Springs*, and that it will have the same ready for operation on or before the thirty-first day of December, in the year one thousand, eight hundred and eighty-nine (1889).

"R. R. CABLE, *President of the*
"*Chicago, Rock Island and Colorado Railway Co.*"

Rec. p. 25.

It will be observed that both in this notice and

also in Section 10, Article III. of the contract, the line so to be built is described as "its line" or "its railway." It is not the building of *a railroad*, or *one of its* lines, to Colorado Springs, but it is an election of the route for *its railway*, and the route for its railway is to Colorado Springs. Limitations.

The Court below, in its opinion, well says:

"A notice that it had elected to build its railway to Denver or Pueblo, or to any other point than Colorado Springs, would not have satisfied the requirements of the contract, which would thereby have become 'void and of no effect.' Rec. p. 1247.

"The essential thing to the life of the contract was the completion of the Chicago Company's railway to Colorado Springs, and the joint occupation of the defendant's railway was to be from that time, and by and through that physical connection."

(k) *The method of compensation for maintenance and operation shows that the terminals were to be used only for business passing over defendant's main line.* Wheelage.

The contract provides: "The cost of operating and maintaining *all* tracks, structures *and facilities* used jointly by the Denver Company and the Chicago Company shall be apportioned between said companies on a wheelage basis. * * * The said Denver Company shall receive from the Chicago Company such a portion of the expenses incurred by the Denver Company in operating and maintaining the railway between Denver and Pueblo operated and maintained by the Denver Company, which shall be as the entire wheelage of the Chicago Company is to the entire wheelage *on said railway between Denver and Pueblo.*" (Article II., Section 2, clause 11.) Rec. p. 16.

The fourth clause of the same section provides, that expense of repairs and of water supplies shall follow the same rule, and the sixth clause fixes the Rec. p. 14.

Limitations. Wheelage. Rep. p. 15.

same proportion for the salaries of general superintendent and subordinate employees, including *switchmen, telegraph operators, train dispatchers* and others.

Rep. pp. 4, 5.

It will be observed that all these expenses for the benefit of both companies are borne in the first instance by the Denver Company, with a provision for reimbursement of the proportionate part by the Chicago Company. (Article II., Section 2, clauses 9 and 11.)

These provisions show that the compensation for maintenance and operation of *terminals* is to be determined on the wheelage basis defined in the contract, and especially so as no other method is provided as to terminals. But, as if to make it more emphatic, it is expressly provided, in Section 1 of Article III., that, if additions are made to

Rep. p. 12.

Denver terminals, and the Chicago Company elects to use such additions, then its share of maintenance shall be based on wheelage *as provided in the previous article*.

The terms of the contract clearly show that this wheelage is to be measured only on the main line, and not on sidings and switches. The granting clause mentions sidings and switches separately

Rep. p. 12.

from the "line of railway" (Article I., Section 1), and the measurement is to be made "*on said railway between Denver and Pueblo*."

Rep. p. 15.

(Article II., Section 2, clause 11.)

The contract, therefore, did not contemplate a computation of wheelage on the sidings and switches in the yards. And as the clear intent of the contract was to provide for all expenses, including the maintenance, repair and operation of all portions of the leased premises, it could not have been the intention of the parties that switches and sidings and terminal facilities should be used

separately from the main line—*i. e.*, for business which does not pass over the main line, on which alone wheelage is or can be computed. Limitations. Wheelage.

We submit that but one conclusion can be drawn from the contract, and that is that the parties understood and intended that the use by the two companies of the *terminals* would and should be practically proportionate to their use, respectively, of the railway from Denver and Pueblo, and therefore the contract made but one basis of measurement, to wit, the wheelage "on said railway between Denver and Pueblo." But this conclusion is entirely inconsistent with the idea that the terminals may, under the contract, be used for the Limon-Denver business.

The contract alone, in our opinion, settles this contention in our favor, but, in addition to this, the evidence shows that it is absolutely impracticable to compute wheelage in terminal yards. This was practically conceded by the complainant in the taking of evidence, and an arbitrary division was suggested which should be *called* a division in accordance with wheelage, but which is not so in reality.

Counsel now say, in their latest argument:

"The defendant could have secured contribution to the operation and maintenance expenses of the terminals upon the basis of the actual proportion of use of the terminals, if it had so desired. It was not content with this." Pl. Arg. p. 62-3.

But the question at issue is not as to whether there is some possible method of giving fair compensation for the service; but, rather, what is the meaning of the existing contract. It is a question of *what is*, not *what might be*.

In discussing the present or past actual use made by the parties of these terminals, and in arguing upon the respective advantages derived by

Limitations, Wheelage.

the parties under past relations of business, counsel depart entirely from the point at issue. Even if their deductions were justified by the evidence (and they are not), yet, under the contract, which runs in perpetuity, the relative positions of the parties may be reversed time and time again.

In any event, such discussion can throw no light on the meaning of the contract.

That the computation of wheelage in the yards is utterly impracticable (and if so impracticable, the railroad men who formulated this contract could not have intended it) is abundantly shown by the testimony.

General Manager Smith says:

Rec., p. 767, bot.; 2170.

"It would be entirely impracticable, without incurring great expense. * * * I mean they would have to have a man on the top of each car."

Being asked as to whether this was the usual method of estimating the movement of cars, in terminal yards, he says:

"No, sir; I never heard of it."

Speaking of the character of the movement of cars in the yards, he says:

Rec., p. 767, bot.; 2171.

"They are moved long distances and short distances, sometimes several times a day, changed from one track to another. Their movements are almost as variable as the number of cars in the yard."

On cross-examination, when asked if this wheelage could not be estimated with reasonable accuracy by agreeing upon the amount of wheelage for each car, he answers:

Rec., p. 844, bot.; 2467.

"No, sir. I do not consider it practicable to do so. It might be done under an arbitrary arrangement. * * * I have never known it to be done; never known of the mileage to be kept in the yards. * * * in the yards proper. I consider it entirely impracticable."

Superintendent Deuel says:

Rec., p. 422, bots.; 852-3.

"I don't think it is possible or practicable,

Limitations. Wheelage.

* * * In the first place, nobody can tell the mileage a car makes in the yard; it would be impossible to do it, unless a man were put on every car. * * * That is the only way I could figure it out, and I do not believe it could be made then. I do not believe it is possible to compute the mileage made by a car in the yard at a terminal station."

Mr. Burns, Superintendent of Transportation, says:

Rec. p. 530, fol. 1277.

"I should consider it impracticable. The Rock Island cars are not, in any instance, moved the distance of a mile in the Denver yards. When a switch engine moves a Rock Island car, it moves it from 300 feet to half a mile. The movements of cars in the Denver yards are so numerous, it would be extraordinary and expensive, and, in my opinion, impracticable to compute the wheelage."

Mr. Palmer, Superintendent of the Kansas Division of the Union Pacific Railway, says it would not be practicable, "because you would have to have a man on every car with a tape-line to measure the distance of the movements of each car."

Rec. p. 668, fol. 1709.

Alexander Campbell, Division Superintendent of the Burlington and Missouri River Railroad, says:

Rec. p. 670, fol. 1720.

"I don't see how that can be done at all. I cannot understand how it could be done. * * * It would be nearly impossible to keep track of just the distance. * * * Cars move a great deal in making couplings, moving trains, opening crossings."

Rec. p. 703, fols. 1904-5.

Mr. Derby, Division Superintendent for the Missouri Pacific, says it would not be practicable to estimate the actual wheelage; that it would have to be made arbitrary, and, if made arbitrary, it would not show the distance actually traveled by the cars.

We contend that, by reason of the impracticability of making an estimate of wheelage in the yards—an impracticability which existed at the time of making the contract, and must always exist

Limitations. Wheelage.

—and by reason of the fact that the contract itself makes no provision for compensation, except on a wheelage basis, and it clearly provides for this method, and how it shall be estimated—the conclusion is inevitable that the parties to this contract did not contemplate any use of the Denver terminals which could not be paid for in the method prescribed by the terms of the agreement. That method is adapted to a use of these terminals such as the defendant maintains is authorized by the contract. It is not adapted to the use which the complainant claims.

Situation of Terminals.

3. *The situation and condition of the Denver terminals shows that the contracting parties intended to use the Denver terminals in connection with the Denver Company's line alone.*

Middleton Ex. 6; T. F. W. and J. F. V. No. 31.

The maps introduced in evidence show the general situation of the railroad lines of the respective parties as well as of connecting lines (Middleton Exhibit No. 1; T. F. W. and J. F. V. No. 31.

The system of railways belonging to the defendant covered some 1,500 miles of track, including various branches and ramifications, and the *northern terminus* of the system was at *Denver*. There it had its terminal yard, which it entered from the south.

A map of the Denver terminal yard is attached to this argument as Exhibit B.

At the time of making the contract and ever since, the terminal yards at Denver were adapted only to the reception of general traffic from the south. They were not and cannot be adapted to the convenient reception of traffic from the north, the only connections at the north being by the main line used for passenger traffic to the

Union Depot in Denver, and a track used for transfer purposes to other systems of railway. Situation of Terminals

At the north end of the Denver yard tracks are abruptly cut off by reason of certain natural and artificial obstacles, Cherry Creek being the northern boundary of the Denver yard, and there being upon the opposite side of Cherry Creek extensive improvements in the way of buildings, warehouses, etc., belonging to private individuals.

It will be observed by inspection of Exhibit B that of the numerous tracks making up the Denver yard all that go to the north end, except two, are "spur" or "stub" tracks, having no outlet to the north.

Exhibit B, and the map from which it is taken, show that there were as many as a dozen of these "spur" or "stub" tracks, and the situation of the property, in reference to adjacent lands and improvements, was and is such that they cannot be made to converge into main stems at the north end of the yard. All tracks in the yard, however, do converge at the south on to the main line of the defendant's system.

The Denver-Limon line passing over Kansas Pacific tracks passes north of Denver, enters the city direct from the north, and, after passing through the Union Pacific terminal yards, business over that line would reach defendant's terminals through the grounds of the Union Passenger Depot (which is no part of the defendant's terminals) and thence by the defendant's main passenger track into the Denver yard.

Mr. Deuel testifies as to the difference between the facility with which cars can be handled coming into the Denver yards from Colorado Springs, or coming into the yards over Union Pacific tracks, as follows:

Situation of Terminals.

"There is this difference, that, as to any train coming from Colorado Springs or Pueblo to Denver, the yard men are advised several hours before it reaches here of the number of cars in the train * * * and its probable arrival at Denver—the time of its arrival—and it gives them a chance to prepare for the reception of the train and taking care of it on its arrival; * * * and it comes into the yard from the end that is provided for the reception of trains from the line. * * * Coming from the Union Pacific, it comes through the Union Depot and on to our passenger tracks, and has to be taken up to the upper end of the freight yard and backed in out of the way, and we have no notice of its arrival, or the number of cars in its train, until it arrives and the conductor registers. * * * It causes that confusion that the train arrives without notice to the yard men how many cars they have in the train, and they don't know when it is going to arrive, and it comes to the wrong end of the yard and has to be taken to the south end of the yard before it can be taken in on the Denver track."

Rec., p. 120, fol. 241.

Rec., p. 120, fol. 241.

Mr. Deuel further testifies that business brought over the Union Pacific tracks by the Rock Island, and destined to points on the Union Pacific system, is brought on to the defendant's terminals at Denver only to be again sent back on the tracks of the Union Pacific system, and as to these cars, he says:

"They have to be switched, and the cars destined for the Union Pacific yard put on the transfer track for delivery to the Union Pacific."

Rec., p. 120.

Other testimony is to the same effect.

Exhibit B is taken from Mr. Cable's Exhibit No. 1, which, it will be observed, is the map that was before him at the time this contract was formulated. The parties then well knew the conditions and limitations of the defendant's terminal yard. The whole situation was patent at the time of making the contract, and shows that there could not have been, in the contemplation of the parties at

the time, any general use of these terminals for business of the Chicago Company to be brought on to them from the north.

4. The use contended for by the complainant would effect an inequality between the two companies. Inequality of use.

This proposition is a natural deduction from the situation disclosed in the discussion of the preceding statement.

Mr. Burns testifies:

Rec. p. 531, fol. 1279.

"Under the present arrangement, all the traffic going over the Union Pacific, the Denver and Rio Grande Railroad officials have no control of. On the business coming in over the Rio Grande they do control. In fact, if there was a blockade in Denver, they could hold out the freight south of Denver. That coming over the Union Pacific they cannot hold out; consequently, it places the Rock Island in a much superior position as regards the business in the yard as compared with the Rio Grande. * * * The Rock Island trains coming from the Union Depot track into the Rio Grande yard, they occupy, on arriving in the yard, one or more of the most important tracks; consequently, the cars that arrive on the Rock Island trains must be switched immediately and given preference over Rio Grande business—otherwise, the yard would be blocked. * * * All business destined for points on the Union Pacific at Denver are brought into the Rio Grande yards in full train lots. These trains are switched by the Rio Grande employees, and business for firms * * * are transferred to the Union Pacific."

The learned counsel for complainant dwell a great deal upon the fact that an *equal* use of the property is granted to the Chicago Company by the contract, but the method of using these terminals contended for works an inequality of use in the fact that it necessarily compels priority and preference of service for the complainant's business brought in from the north, for, coming in over the main tracks, it must be immediately taken out of the way and disposed of; whereas, business coming

Inequality of use.

from the south can be at once distributed on side tracks and take its turn in due course for proper distribution.

Expenditures.

5. *The large expenditures on main line which the contract required of the defendant are inconsistent with the complainant's contention.*

Rec. p. 11

Reference to the first clause of Section 2 of Article II. of the contract enumerates divers extensive and costly changes which the Denver Company was to make in its main line for the purpose of receiving the increased traffic which it was expected the Chicago Company would bring upon the line.

But by the practice resorted to by the complainant of bringing its business by way of the Union Pacific tracks, the business brought over the main line between Denver and Colorado Springs is greatly reduced, and there is a corresponding decrease in the compensation which the defendant receives from the occupancy of its track by the complainant company.

Rec. p. 976.

Rec. p. 1230.

The evidence furnished by the statements of Mr. Murphy, the Auditor of the defendant (Record, page 2061), and the evidence of Mr. Josslyn, the car accountant (Record, page 1230), show that while the business of the complainant between *Pueblo* and Colorado Springs amounts to twelve and one-half per cent of the aggregate wheelage over that portion of the line, yet since the diversion to the Union Pacific lines of business to and from Denver, the complainant's wheelage on the line between Colorado Springs and Denver is only four and one-half per cent of the aggregate wheelage on that part of the defendant's line. Yet this is the part which leads directly into the Denver terminals.

This is an illustration only of the effect of complainant's action. If the Chicago Company may remove a portion of its Denver traffic from its

line, it may remove it all under this contract, use the line from Colorado Springs to Pueblo for Pueblo business, and use *only the terminals* at Denver for all business, going to, from or through *Denver*. Expenditures. Rec. p. 14.

Counsel argue that if they do not use the track they do not wear it out, and that the contribution to expenses on the wheelage basis is only to cover deterioration and a proportionate part of operating expenses according to use actually made.

Counsel admits that there are certain elements of deterioriation which go on in the absence of use, but considers them insignificant. But counsel overlook the fact in that part of their argument of the heavier proportionate use of terminal facilities, and also the fact that the salaries of Superintendents and of subordinate employees—switchmen, telegraph operators and train despatchers, are not diminished by the fact of the smaller use or the non-use of the line from Colorado Springs to Denver for the Chicago Company's business; and yet the Chicago Company's contribution to these expenses is diminished as it diminishes its wheelage over this line. It is a well known fact, also, that the cost of terminal service bears a very large proportion to the aggregate cost of service on the entire line.

Under the method which the complainant contends for, it gets the benefit of this more valuable service without contributing any corresponding proportion of the cost thereof.

6. Complainant's contention is not aided by the fact that the Chicago Company pays interest on one-half the value of the leased property. Interest.

The learned counsel for the complainant urge, in support of the proposition that Denver terminals may be used for its business brought over

Interest

the Union Pacific track, the fact that it pays interest at five per cent per annum on one-half of the value of the property described in the contract.

It is difficult to see the relevancy of this fact to the point in issue.

Conceding as true all that counsel say on the subject, and yet it will not in the slightest degree militate against the proposition that under this contract the traffic must come via Colorado Springs and pass over the line on the value of which that interest is paid. It does not affect the propositions that no connection was permissible except at Colorado Springs and Pueblo; that the contract cannot be severed from the line to which it is in terms attached; that these terminals are appurtenant to the Denver line only; that all through business must pass via Colorado Springs; that the contract would never have acquired validity except for the selection of the route via Colorado Springs; and that trains must pass over the Denver line in order to adjust the relative burden of terminal as well as other expenses.

Grant the argument what force they would, and yet the strength of defendant's position will not be weakened.

Here, again, counsel dwell upon the relative magnitude of the business done for the time being by each party, and try to draw therefrom an argument as to the meaning of a contract which lasts forever. The relative amount of business fluctuates monthly and yearly; the conditions of to-day may be reversed a year hence; the contract remains unchanged, whatever the ebb or flow of the business of either company.

It is true the Chicago Company pays two and one-half per cent per annum on the value of the property for the *right* to use it; but for the *exercise*

of that right it must make further payments of expenses occasioned by the use. Interest.

Counsel cite in this connection the opinion of Mr. Justice Brewer in the case of The Central Trust Company vs. Wabash, St. Louis and Pacific Railway Company, 29 Fed. Rep., 546, to the effect that interest on one-half of the value of the property is reasonable rental to be paid for the *right* to equal and joint use by an incoming company, which then had the smaller traffic. But the very decision to which counsel thus refer distinguishes between the compensation for the *right* to use and the compensation growing out of maintenance and operation, and the remarks of the Court are pertinent to the case at bar. Pl. Arg. p. 39.

"It is a familiar fact that in a large city like St. Louis [and the same is true of Denver] along the track of an important railroad within the city limits are built large manufacturing establishments, warehouses and other buildings for the convenient transaction of business between the railroad on the one hand and the manufacturer and the merchant on the other. Another road coming over the same track not only uses the property of great value which the company owner has in the first instance paid for, but also shares in the benefit of access to all these manufactories, warehouses, etc." It thus places itself in competition with the original company for its valuable business. Such competition may operate to diminish the business of the original company, or compel it to lower its rates to preserve the business. In either way it operates to the serious detriment of the original companys the new company comes in as an equal competitor; it shares in all the benefits of this business, and it may share equally. Under these circumstances, it seems to me no more than fair that a new company which crowds itself into an equal access to such benefits and such privileges should pay an equal share of the interest on the value of the property." Cent. Tr. Co. vs. Wab., St. L. and Pac. Ry. Co., 29 Fed. Rep., 549.

29 Fed. Rep., 559.

The Court, at the same time and in the same

Interest.

opinion, holds that cost of maintenance should, in addition, be paid on a wheelage basis.

If the complainant or the Chicago Company had built an independent line having advantages corresponding to those of the Denver line, it would have had to pay out the full sum of $3,000,000, and still have the cost of maintenance, repairs and operation in addition thereto.

By the contract with the defendant company, however, the Chicago Company obtained the full benefits of such a line, with the payment of interest upon one-half of what an independent line would have cost it, and the burden to the defendant of having another company occupying its line is the consideration on its part for the payment of this annual interest charge, as also for the payment of the apportioned part of taxes. But this part of the payment has nothing whatever to do with the other elements of the case which relate to maintenance, repairs and cost of joint operation, including salaries, which would relatively diminish as the aggregate business on the line increased.

It was optional with the Chicago Company to build its own line to Denver and Pueblo at double the price it pays the defendant for the use of its line; and, on the other hand, it was optional with it to take under this contract, and, for one-half the cost of an independent line, obtain the benefits of the defendant's line. Having taken the latter option, it was the duty of the Chicago Company and its successors to bring its traffic to Denver or Pueblo over the defendant's track. In any event, it has no right to divert, at a point east of Colorado Springs, the main part of its traffic on to another line to Denver; much less has it the right to use the defendant's Denver terminals for the benefit of a business so diverted.

7. The complainant was not admitted to the use of Denver terminals for business brought over Union Pacific tracks, as being entitled thereto under the contract, but was admitted, temporarily, under an outside agreement, upon its distinct promise to pay.

Agreement to pay.

In the month of May, 1880, Mr. Allen, General Superintendent of the Chicago, Kansas and Nebraska Railway Company, and afterwards General Manager of the complainant company, called upon the General Manager of the defendant company to arrange for the reception, on Denver terminals, of cars which were brought over Union Pacific tracks.

Up to that time, no business had been brought by the plaintiff, or by the Chicago Company, on to the Denver terminals except by way of Colorado Springs.

General Manager Smith very promptly stated Rec., pp. 748-9. that the contract did not cover this business.

Before admitting these cars upon the Denver terminals, Mr. Smith sent Mr. Cable, President of the complainant company, the following telegram, under date of May 10, 1880:

"I have just seen Mr. Allen, General Superin- Rec., p. 870. tendent, and have notified him that, although we are not required by our contract to handle or care for your trains or equipment brought to Denver over the Union Pacific line, we do so, temporarily, with the understanding that the compensation for such service, as also for the use of our tracks for such trains, will be paid at an early date."

(Smith's Exhibit No. 1, p. 870.)

Here was a distinct statement of the defendant's understanding of the contract upon this subject, and if the complainant disagreed with the defendant upon the meaning of the contract, it was then called upon to so state, and the issue would have been at once presented at the very inception of the exercise of this alleged right.

Agreement to pay

Rec. p. 570, fol. 2567.

But Mr. Cable, under date of May 11, 1886, answered this telegram in the following words:

"Your telegram received. Of course, any service performed for us, not covered by contract, will be paid for by our company. When I come out in June, I will spend time enough with you to take up all matters between us that may require attention. Have no doubt that everything can be satisfactorily arranged."

Mr. Cable does not here raise any question as to the construction of the contract then insisted upon by Mr. Smith, and when this telegram is taken in connection with the one to which it is an answer, it becomes an admission that the use of Denver terminals for complainant's Union Pacific business was not within the terms of the contract.

Under the promise so definitely made by the President of the complainant company, these trains were admitted from the north on to the Denver terminals "temporarily," but they were so admitted under the definite promise to pay for such service and use of tracks as did not come under the contract then existing between the Chicago Company and the defendant.

This contest and the original application for an injunction, before Justice Miller, arose from the fact that the complainant declined to keep its promise, and, in consequence of such refusal, the defendant gave notice that it would exclude these trains from the north from its Denver terminals.

Decree.

Ill. Mag. p. 74.

8. There is no inconsistency in the decree.

An alleged inconsistency in the decree is urged by counsel at page 74 of complainant's argument, in the fact that the decree prohibits the use of Denver terminals for complainant's cars brought over Union Pacific tracks, yet permits the handling by it of traffic received from or delivered to other companies.

There is no inconsistency in these provisions of the decree. The point is practically covered by our discussion under the heading numbered "2" (c) *Supra*, page 11. Decree.

The part of the decree which is claimed to show this inconsistency is the last clause of paragraph 3. The point does not seem deserving of further argument, for it is too clear for discussion that this part of the decree refers to the interchange of traffic between connecting carriers, and is meant simply to protect the rights secured by Section 11 of Article III. of the contract. Rec., p. 1260.

The complainant, in carrying traffic to and from Denver via Colorado Springs, would have occasion to deliver to and receive from connecting carriers, and the decree permits that company to handle such traffic with its separate employees. Rec., p. 23.

If the Union Pacific Company hauled these cars to or from Denver, it would deliver or receive over a transfer track, but it would not have the right to "make up" and "break up" its trains in the defendant's yards, or to load and unload at its freight houses, or to receive or deliver goods at warehouses, coal yards, stone yards, etc., reached by spurs or sidings from defendant's terminals.

But it is these very privileges that the complainant demands. It is entitled to them for the cars moved over defendant's main line, and the decree protects that use, including the transfer of cars to and from connecting lines; but at the same time rightly says that these valuable rights do not appertain to the Denver-Limon line, which can in any event have no greater rights than would in the comity of railroad companies be granted any connecting carrier, to wit, the right to receive and deliver cars over a transfer track in the process of through transportation.

Public policy.

9. The plaintiff's contention is not aided by any considerations of public policy.

If Mr. Cable, or a construction company, or some other agent, had been commissioned by the Rock Island Company to locate a route from a given point on the Kansas boundary *to Denver*, and had, for certain personal considerations, located a long route via Colorado Springs, instead of a short, direct route, and the propriety or validity of such selection then came into controversy between the Rock Island Company and the locating agents, the authorities cited by the learned counsel for the plaintiff would be pertinent.

II. Arg. pp. 7-10.

That is not this case. The Chicago Company was to build to *Colorado Springs*. This contract was made *because* the line was going to that point. Having concluded to build to Colorado Springs as its objective point, it was competent for it to agree that, in consideration of the lease of defendant's line, it would, among other things, carry its Denver traffic over the line so leased.

The contract being based on the proposition that the Chicago Company would connect at Colorado Springs, that company could not divert its business elsewhere; and the Rock Island Company, upon leasing the Chicago Company's line, was bound morally, if not legally, to utilize that line in the same manner and to the full measure required of the Chicago Company under the contract. Instead of contributing $50,000 annually to the revenues of a competing line, it was in duty bound to contribute all its business to the line described in the contract.

Pl. Arg. p. 24.

The principles of public policy, instead of aiding, tend, rather, to refute the plaintiff's contention. The Chicago Company, having a line from the East, via Limon and Colorado Springs, to Denver,

was prohibited, not only by principles of public policy, but by express statute, from leasing the Union Pacific line from Denver to Limon. That was a competing line. The statute of Colorado permits a lease only of lines which are *continuous* and connected and *not competing* or parallel. (See Appendix.)

Public policy.

Gen. Stat. Colo. (1883), p. 214.

The Rock Island Company, as the lessee of the Chicago Company's line, was, of course, bound by the same principle and by the same statutory prohibition.

In this connection, it may be remarked that the lease by the Chicago, Rock Island and Pacific Railway Company of The Union Pacific Company's line from Limon to Denver is in contravention of law for another reason. The Chicago, Rock Island and Pacific Railway Company is a corporation, organized and existing under the laws of the States of *Illinois* and *Iowa*. This is the first proposition contained in the plaintiff's bill of complaint. But, under the Colorado statute, a lease is permitted only where the lessor and lessee are organized under the laws of Colorado, or under the laws of adjoining States or Territories. The complainant company, not being organized under the laws of a State adjoining the State of Colorado, could not acquire by lease a railway line situated within the State of Colorado.

Rec. p. 2.

Although these propositions are true, yet the argument of the main proposition under consideration does not require us to go so far. We may well concede either that the Chicago Company had a right to build a separate line into Denver, or acquire rights over other railway tracks to that point, or that the complainant company might do the same, and yet the proposition remains unanswered that, in so acquiring or building such

Public policy.

tracks into Denver, they could not, for the business carried over those tracks, use the defendant's terminals. If either of these companies had the power to build or acquire tracks to Denver, it was a necessary incident to such arrangement that they should acquire also separate terminal facilities at Denver. In contracting with The Union Pacific Company for trackage from Limon to Denver, it was their duty to contract, at the same time, for the use of Union Pacific *terminals* at the city of Denver.

The argument of the defendant is complete if it succeeds in showing that the plaintiff can not, by authority of the contract under consideration, use the defendant's Denver terminals for business which it does not carry over defendant's line.

This is a matter of the greatest importance to the defendant; it is the principal matter of difference between the plaintiff and the defendant; and we respectfully insist, upon the considerations heretofore mentioned, that the decree of the Circuit Court on this question should be affirmed.

Importance of terminals.

10. The well known relations of terminals to railway lines are inconsistent with complainant's contention.

We have already argued that the Denver terminals in controversy are appurtenant only to the main line. While this is true, yet the importance and value of the terminals in a large city for any extensive system of railway, can hardly be overestimated. They are necessarily situated in locations where lands for extensions and enlargements are very costly and difficult to obtain. The character of railroad facilities at such terminals is complicated and so expensive that it constitutes a very large

proportion of the total cost of operation of the entire railway. Importance of terminals.

So important and at the same time difficult is the subject of railway terminal facilities, including terminal charges, that it has in England become a separate and fertile field of legislative and judicial action, and in the United States the relative rights involved in the use of such facilities are in themselves the subjects of important and carefully guarded contracts between railway companies. The value of such facilities and also the necessity of reserving their use to the system of railroads to which they are appurtenant increase as population grows and the business of the railroad becomes larger.

The relative importance and value of these Denver terminals, their necessary increase of value as time advances, the difficulty and cost of enlargement, the growing demands upon them of the business to come over the Denver line, must have been known to the experienced railroad men who formulated this contract, and with such knowledge the conclusion is inevitable that if a use of the Denver Company's terminals for traffic which did not come over its lines, nor yield it any revenue, was contemplated, such understanding would have been expressly stated in the instrument.

A reversal of the positions of the parties under this contract may illustrate the situation. The complainant owns valuable terminal facilities in the city of Chicago. There is in Illinois a place called "Wyanet," at the crossing of the Chicago, Rock Island and Pacific and the Chicago, Burlington and Quincy lines.

Suppose that the defendant, building eastward, and for the sake of a direct line into Chicago, should lease the equal use of the Rock Island road

Importance of terminals.

between and including Wyanet and Chicago, contributing to expenses on the basis of wheelage between these two points. And, having under such contract entered into the use of the Rock Island terminals in the city of Chicago, suppose that the defendant should then contract with the C., B. and Q. for trackage rights from Wyanet to Chicago, and divert its business from the Rock Island line to the C., B. and Q. line, and yet claim the use of the Rock Island terminals in Chicago for "making up" and "breaking up" of its trains brought over C., B. and Q. tracks, utilizing its access to elevators and warehouses adjacent to Rock Island terminals for the increase of its business carried over the C., B. and Q. line, contributing large sums annually to the revenues of the latter company, which would, in the absence of such new trackage agreement, have gone under the original contract to the Rock Island Company.

If such an attempt were made to use the Rock Island Chicago terminals for traffic brought over other lines, would not the complainant cry out in indignation, and either by force or the strong arm of the law attempt to prevent such usurpation?

And is the situation otherwise in Denver? The use of defendant's Denver terminals for the traffic of the Chicago Company brought over the Denver Company's tracks is conceded, and to whatever extent that traffic may grow, but to impose upon these terminals the traffic brought over other lines yielding to the Denver Company no revenue, and to make use of these terminals as facilities and conveniences for the handling of traffic which is foreign to the leased line, constitutes a usurpation condemned alike by reason and by the law as applied to the contract between the parties.

II.

THE WORDS "SHOPS AT BURNHAM" INCLUDE ALL LANDS AND IMPROVEMENTS SITUATED WEST OF DEFENDANT'S MAIN LINE EXTENDING FROM THE NORTH LINE OF THE "BURLINGAME TRACT," SOUTHERLY TO VASQUEZ STREET. (See Exhibit C.)

The discussion of this subject will cover appellant's sixth assignment of error.

Shop grounds. The complainant contends that by the contract the Chicago Company acquired an interest in the tract of land lying at the south end of the defendant's shop grounds, shown on the maps as bounded on the south by Vasquez Street; on the east by the right of way of defendant's main line; on the north by Sixth Avenue extended, and on the west by Lake Archer. (See Exhibit C.) That it also acquired an interest in the rectangular piece of ground designated as the "Burlingame tract." (See Exhibit C.) And also a like interest in certain tracks, especially a certain coach track, lying in the very midst of the shop tracks, and, as defendant contends, a part of the shop tracks.

The first tract of land above mentioned will in this discussion be designated as the "twenty-acre tract." It is on this land that a wye has since been constructed for the turning of trains.

But defendant contends that no interest in any portion of these premises passed to the Chicago Company under the contract.

Extent of grant. 1. *Even if the excepting clause be disregarded, yet the grant did not by its terms convey any interest in the twenty-acre tract or the "Burlingame tract."*

a. No lands were granted.

Rec. p. 12. The description of the property of the defendant covered by the contract is "its tracks, build-

Extent of grant.

ings, stations, sidings and switches on and along its line of railway between and including Denver and South Pueblo, * * * meaning and intending hereby to include in the description aforesaid all and every portion of its railway and appurtenant property between and at the points aforesaid."

No lands conveyed.

As the Court below said in the opinion

Rec. p. 1237.

"It will be observed that neither the words 'real property' nor 'real estate' nor 'lands' nor 'grounds' are anywhere used in describing any portion of the property covered by the granting clause of the contract."

We also suggest that the parties having in the first clause enumerated the classes of property covered by the grant, the subsequent clause, interpreting, or condensing into general words the particulars enumerated, can only refer to property of like character to that specifically mentioned.

"Tracks" doubtless would include the right of way which they occupied; "buildings," the ground on which they stood and which was *used* in connection with them; "stations" would include depot grounds; "sidings and switches" would include the ground on which they rested; and these terms being in the subsequent clause interpreted as meaning the "railway and *appurtenant property*," the things associated with and incident to these particulars would also pass; *e. g.*, with the buildings would pass the platforms, means of access, etc.; with "sidings and switches" would go also the incidents to their proper enjoyment, such as signal towers, switch stands, machinery in use for interlocking switches, and the like.

But which of these words would convey any *land* at the time not occupied by any of the classes of property mentioned?

The tracts of land in controversy could not,

under the widest latitude which the words can take, be called *tracks* or *buildings* or *stations* or *sidings* or *switches;* and if we take the word "railway," used in the interpreting clause, even if unrestricted by the preceding particulars, yet it could not cover lands at the time unoccupied by the railway. Extent of grant.

If this land passes under the contract at all, it must be by virtue of the words "and appurtenant property."

(b) The lands in controversy are not appurtenant to the property granted. Lands not appurtenant to R. R.

As already suggested, the words "appurtenant property" must here be construed only in relation to the particulars first enumerated. They are not contained in the original statement of the property granted, but the words "its railway and *appurtenant* property" are used as synonymous with and as defining in general terms the property specifically mentioned as the premises granted, and the two clauses become mutually explanatory.

But on what principle can these then unoccupied lands be deemed appurtenant to any tracks, or buildings, or stations, or sidings, or switches? They were not used in connection with nor were they essential to the enjoyment of any of the particular classes of property described.

Under well settled principles of law, however, the title *to lands* will not pass under the words "appurtenant property" as used in this contract.

Counsel for appellant quote from a New York case a definition of the word "appurtenant." The quotation may well be carried further. The Court says: Pl. Arg. p. 25.

"A thing 'appurtenant' is defined to be a thing used with and related to or dependent upon another thing *more worthy*, and agreeing in its nature and quality with the thing whereunto it is Woodhull vs. Rosenthal, 61 N. Y., 390.

Extent of grant

appéndant or 'appurtenant.' It results from this definition that land can never be appurtenant to other land, or pass with as belonging to it."

Lands not appurtenant to R. R.

Woodhull vs. Rosenthal, 61 N. Y., 390.

In another case cited by counsel, this Court has said of the word "appurtenances:"

Harris vs. Elliott, 10 Peters, 54.

"This term, both in common parlance and in legal acceptation, is used to signify something appertaining to *another thing as principal*, and which passes as an incident to the principal thing. Lord Coke says (Coke Lit., 121 b.), 'A thing corporeal cannot properly be appurtenant to a thing corporeal, nor a thing incorporeal to a thing incorporeal.' According to this rule, land cannot be appurtenant to land."

The principles above announced are reiterated by this Court in Humphrey vs. McKissock, also cited by counsel, and the Court there also says further concerning the word "appurtenant:"

Humphreys vs. McKissock, 140 U. S., 314.

"It does not include property acquired simply because it may prove useful to the company and facilitate the discharge of its business. A distinction is made in such cases between what is indispensable to the operation of a railway, and what would be only convenient."

In the matter of the New York Central Railway Company vs. Buffalo, New York and Erie Railroad Company, the thing demised was a railroad; the property in controversy in this case was a strip of land adjoining the depot; the Supreme Court, on the principles above announced, held that it did not pass in a lease under the term "appurtenances."

N. Y. Cent., etc., vs. Buffalo, etc., 49 Barb., 504.

The Court of Appeals on this branch of the subject takes the same view, saying:

N. Y. Cent., etc., vs. Buffalo, etc., 49 N. Y., 418.

"The opinion of the General Term conclusively shows that the strip of land in question cannot pass under the lease to the appellant as appurtenant to the other land demised; that easements or servitudes only can so pass; it being a maxim of the

common law that land cannot be appurtenant to other land." Extent of grant.

The case was reversed, it is true, but on other grounds which are not applicable here.

In the question under discussion, as no lands are conveyed except as they constitute a part of the *railway*, tracks, buildings, stations, sidings or switches, the lands now in controversy were not granted, unless the word "appurtenances" had that effect. This is impossible under the very authorities cited by appellant's counsel. Lands not appurtenant to R. R.

The "Burlingame tract" consisted of six acres; the twenty-acre tract, as suggested by the term, of twenty acres. Exhibit C, attached hereto, and the maps from which it is taken, show the condition of these lands at the time the contract was made. This large acreage of land then unoccupied by any of the classes of property described in the grant could not have passed under the contract. Cable Aff., Rec. p. 893, fol. 31.

But if it be assumed that the property in controversy is "appurtenant" to anything else described in the contract, then does it come within the grant or the exception?

The entire description of the property, the use of which is granted, is in general language in one sentence, although covering an immense amount of property in extent and value, and in the midst of the sentence containing the granting clause are the words "excluding its shops at Burnham." Nothing in the grant is described by metes and bounds; no inventory is attached; but this one short sentence serves to cover $3,000,000 worth of property, and at the same time to exclude from the grant other property worth many thousands. Appurtenant to shops.

As under this general language shops were expressly excluded, any lands or other property which might pass under the terms "appurtenant property"

Extent of grant.

must be appurtenant to something else than the shops. As the shops are here distinguished from the railway as such, those things which are "used with and related to" the shops as the *more worthy thing*, and are not used with or related to the railway considered as distinct from the shops, must be considered as appurtenant to the shops rather than to the railway, and would belong to the exception and not to the grant.

Appurtenant to shops.

When the general language used in this sentence is considered for both the granting and the excepting clauses, we think there can be no question, even from the language of the sentence itself, that "shops" as here used means not merely the buildings, but also the entire compact body of land lying west of defendant's main line upon which all shop facilities were located, and which had all been procured for shop purposes, and by its relation to the shop buildings was manifestly intended only for shop purposes.

We contend that these lands did not pass under the grant at all, because not included in the words describing the things granted, and that they could not pass under the word "appurtenances" because that term is not sufficient to pass the title to or an interest in lands, but that if the term "appurtenances" should be so broadly construed under this contract as to apply to lands at all, then that the lands in controversy are appurtenant to the shops and not to the railway.

Map of shops.

2. Defendant's maps submitted to the Chicago Company show that these lands were included in the excepted "shops."

(a.) The shops at Burnham, including all tracks and facilities there used, were no part of Denver terminals.

The Denver terminal yard was more than a mile north of the shops, and the two properties were connected only by the ordinary right of way through certain city streets, as will clearly appear from the maps marked as "Cable Exhibits 1 and 2;" and all other maps showing the Denver yard and the Burnham shops.

Map of shops Not "Terminals."

Cable Exhibits 1 and 2. Smith Exhibit C. T. W. & J. F. V. 1 and 2.

These maps were transmitted not as showing "*terminal facilities*," but as showing all the defendant's property at the places named.

Under date of December 21, 1887, the defendant's Chief Engineer writes to the complainant's Vice-President and Chief Engineer, as follows:

"DEAR SIR: As directed by the General Manager, we send you to-day, by express, maps of our depot grounds and *property* at Denver, Pueblo and Colorado Springs, *showing the number of acres of land owned by this company at these places*."

Smith Exhibit C. Rec. p. 886.

Mr. Smith testifies:

"I left instructions at various times that he (defendant's Chief Engineer) should furnish Mr. Parker and Mr. Cable any maps or other data that we had referring to the property of the company between Denver and Pueblo; and they availed themselves of it. They had access to the Engineer's office, and could have had anything that they called for in that line."

Rec. pp. 835-6, fol. 2473.

These maps contained inventories of defendant's property, with descriptions of land, and the numbers of city lots. They were submitted more than two months before the contract was signed, and before it had been fully formulated. They made a complete showing of defendant's property, and out of it all the parties selected the portion they chose to cover by the grant.

Having before them the maps which by "red lines" and careful descriptions disclosed a large

Map of shops. Not "Terminals."

amount of lands, some occupied, and some unoccupied, some necessary for railroad use and some not then available for such use, the Chicago Company asked and received out of it all only the tracks, buildings, stations, sidings and switches (*i. e.*, the railway) and appurtenant property.

These maps, when compared with the description in the contract, instead of giving the measure of what was granted, conclusively show that the grant was *not* commensurate with defendant's ownership, but that, on the contrary, out of defendant's entire estate there was carved only so much as the Chicago Company deemed essential to the operation of its trains on defendant's tracks.

Title of Burnham maps.

(b) The title of the Burnham map is opposed to complainant's contention.

When this contract was under negotiation, the parties had before them a map of Burnham shops, which, in itself, clearly indicates how the word "shops" was used by the defendant, and gave notice of its meaning to the other contracting party. This map was the same as Smith Exhibit 20. Exhibit C, hereto attached, represents on a small scale the premises so far as involved in this controversy.

A fac-simile of the title of that map is set forth as Exhibit D, hereto attached. It is a map of the "Denver and Rio Grande *Railway Shops at Burnham.*"

This map of the "shops" shows certain *lands*. "Hatched" lines are used for the purpose of designating the outer boundaries. In the midst of the compact body of land included within these "hatched" lines are situated divers shop buildings, and, covering a large part of the same land, are numerous tracks leading to, through and on either side of the several shop buildings.

The "hatched" lines above mentioned include all property herein in controversy, except the six acres constituting the "Burlingame Tract." This tract was purchased for shop purposes subsequent to the making of the map, but before the making of the contract. Map of shops.

Mr. N. W. Sample is the superintendent of motive power and machinery of defendant, and has been in charge of "the shops" since their original acquisition and construction in 1871. We ask the attention of the Court to his testimony:

"Q. Are you familiar with the grounds that have been procured for shop purposes at Burnham? A. Yes, sir. Rec. p. 719, fol. 1957.

"Q. I call your attention to the map which has heretofore been introduced by Mr. Smith and is identified by the master as the first map produced by Mr. Smith, and I will ask you to state what is the southern boundary of what has been known as the grounds connected with the shops at Burnham? A. I think we call it Vasquez (erroneously printed 'Lavasques') Street. Shop boundaries.

"Q. What is the relation of that line to what is known as the 'Bailey tract?' A. It is the northern boundary of the Bailey tract, as far as I know. Rec. p. 720

"Q. What is the northern boundary of the grounds which are included in the shop grounds at Burnham, as you know them? A. The north line of the Barlingame tract.

"Q. On which side of the main track of the Rio Grande Railroad Company are its shops at Burnham situated? A. On the west side of the main track.

"Q. You say you have been connected with these shops for nineteen years—since they were first constructed? A. Yes, sir.

"Q. Will you please state what the first shop grounds were in that early period of nineteen years? Can you tell from this? A. My recollection of the original tract is the southern boundary, is across here (pointing to map). I think that was Martin Street.

"Q. Is that the line which is at the end on which is marked 'quarter section corner' on the

Map of shops.

map submitted to you? A. That is my recollection of it.

"Q. Where was the original northern boundary? A. The south boundary of the present Burlingame tract.

Shop boundaries.

"Q. When were any additions made to the shop grounds you have just spoken of? A. There was a tract bought from Bailey in 1881.

"Q. What tract is that as marked upon this plat? A. Marked 'D. & R. G. Co., 20 A.'

"Q. What is the southern boundary now of that tract? A. Vasquez Street extended.

"Q. You may state for what purpose that property was bought in 1881. A. For additional shop and shop grounds, storing of material and all that kind of thing.

Rec. p. 720.

"Q. You may state, then, from that time on until any subsequent purchases were made what the northern and southern boundaries of the shops at Burnham were, of the property then known as the shops at Burnham. A. The northern boundary was the south boundary of the Burlingame tract up to '87, and the south boundary was Vasquez Street.

"Q. When was any additional ground purchased, and in what year? A. The Burlingame property was purchased in 1887.

"Q. State for what purpose the Burlingame tract was purchased. A. For additional shop ground.

"Q. Then in February, 1888, what was the extent of the grounds included in the shop grounds at Burnham? A. I am not sure but the title to that

"Q. Assuming the Burlingame tract was purchased in 1887, what were the bounds of the shop grounds at Burnham in February, 1888? A. It would be the northern boundary of the present Burlingame tract and the northern boundary of this Bailey tract.

Rec. p. 720, 2nd line.

"Q. These boundaries you have mentioned were the north and south boundaries, respectively? A. Yes, sir.

"Q. Which side of the main tracks is this property? A. West.

"Q. State whether it was in a compact body, or if intervening lands of other ownership were there

from the time of the purchase of the Burlingame tract. A. As far as I know, it was all compact. Map of shops.

"Q. State whether or not that property has remained as the property used for shop ground from then until now. A. Yes, sir."

This clearly shows what the defendant understood and intended by the words "its shops at Burnham." The title of the map, furnished to the other contracting party, necessarily gave notice of this understanding. The map so entitled was the basis of the contract in designating what was excluded from the grant. Shop boundaries.

The title of the Burnham map, being a map of the "shops," would naturally put the complainant upon inquiry as to what would or what would not be included under that term; and the evidence is to the effect that this very natural and almost inevitable inquiry was actually made, and the whole subject discussed.

General Manager Smith testifies:

"Mr. Cable asked where I considered the dividing line was between the right of way and the property coming under the agreement and the shop grounds, and I told him it included everything east of a point from the coal chute east of the office ground and extending south to the shop grounds where it connected with usual right of way of fifty or 100 feet, I don't remember which, excepting the leaders that went into the shop. Rec. p. 738, fol. 2059

"Q. Do I understand you mean by that that in the proposed contract which was then being drafted—that a part east of the line you have mentioned would come under the contract, and that a part west of it would not? A. Yes, sir.

"Q. You may state as to whether or not, upon the blue print that you then had before you, there was any mark made to designate it, and if so, what and how. A. There was made a sort of an off-hand line with a red pencil. * * * It was not a well defined line; it was just off-hand, without any rule or idea of making any lines clear across; it was really to illustrate in the conversation what was meant and intended. Rec. p. 739, fol. 2062

Map of shops.

"Q. Now, in that conversation, what was said or indicated by your marks as to the south boundary of what you considered as shops? A. Well, the line extended to the south boundary of the twenty-acre tract, marked, on which the ice-houses on the present Y is located.

Shop boundaries.

"Q. What was the north boundary of the tract that was then the subject of the conversation? A. Well, the north boundary was the other tract, which was purchased in 1887.

"Q. Do you mean the Burlingame tract? A. Yes, sir.

"Q. Did the ground include, or exclude, what you are talking about as shops—did it include or exclude the Burlingame tract? A. It included the Burlingame tract and the other tract, and everywhere east of this line described was to go into the valuation and be considered as joint property and worked under joint interests; west of that was to be considered shop grounds and was not to be included in the valuation.

"Q. Mr. Smith, was there any conversation between yourself and Mr. Cable, in reference to the effect of such a designation of shops at that time? A. Yes, sir. Mr. Cable suggested that, with a dividing line drawn in that manner, that it was excluding them from the coal chutes as they were then and now located, and I replied to that by stating that there would be no trouble about that, that we would arrange to give him access to the coal chutes, and with that statement on my part he seemed to be satisfied with it."

Rec., p. 774, fol. 2095.

Mr. Smith testified to the same effect on cross-examination, and again on re-examination.

Rec., pp. 775, 776, 794, 795, 852.

On this subject Mr. Smith is contradicted by Mr. Cable. Counsel argues that he is also contradicted by Mr. Low. But such is not the evidence. Mr. Low simply says that it did not occur in *his presence*. [Record, p. 608.] Mr. Smith does not say that Mr. Low was present when this subject was mooted, but merely says that he was present at some of the early conversations in which the "proposed arrangement" between the companies was discussed.

Rec., p. 608, fol. 1565.

Rec., p. 774, fol. 2096.

The facts relating to the discussion as to the extent of the "shops" rests solely in the testimony of Mr. Smith and Mr. Cable. Mr. Smith is entitled to greater credit; his testimony is either true, or it is entirely manufactured and the product of perjury. Mr. Cable's negative denial may result from lapse of memory. Both are reputable men. All the facts and circumstances, the maps under consideration, the situation and necessities of the respective parties at the time, the condition of the property in relation to the line of railroad, and to the terminal facilities at Denver—all support Mr. Smith, and are opposed to the recollection of Mr. Cable. Map of shops. Shop boundaries.

3. *The valuation of the granted premises did not include the shop grounds, or any tracks, or other improvements thereon.* Valuation.

The learned counsel for appellant, at page 22, Pl. Arg. p. 23. make an argument from "probabilities." The evidence justifies an argument from facts established. The conclusion derived by appellant's counsel from the *probabilities* is that "the whole transaction shows that it was the understanding of the parties at the time that the entire 113.78 acres were embraced in the lease, save and except the *structures* which constituted the shops at Burnham and *the land lying* Pl. Arg. p. 23. *under them.*"

We have already argued that the contract did not cover all of defendant's property at Denver, but that out of its entire estate a certain portion only was carved, which is specified in the several words of description used in the granting clause.

The valuation as finally agreed upon not only supports this contention, but as we think specifically shows that none of the shop grounds or improvements were included.

Valuation.

There was no joint appraisal of the demised premises. Mr. Parker for the one company, and Mr. Eicholtz for the other, went over the main line from the southern limits of Denver to the northern limits of Pueblo, but did not appraise any property at Denver or Pueblo.

Pl. Arg. p. 59.

Complainant's counsel discuss Mr. Parker's valuation at page 59 of their argument. His appraisal of main line outside of the cities of Denver and Pueblo was $15,830 per mile. This appraisal was made early in December, 1887. The contract was formulated after that, and provided that the defendant company should add to the existing value by fencing the entire line from Denver to South Pueblo; rebuild a certain bridge with iron and steel superstructure; substitute a heavier weight of rail between Denver and Pueblo; and lay an additional track for six miles out of Pueblo, and complete certain structures then begun (Contract, Article II., Section 2, Clause 1).

Rec. p. 1094.

Rec. p. 1091.

Rec. p. 14.

The contract, containing these requirements, is dated February 15, 1888. On February 16th, after the drafting, but before the signing of the contract, Mr. Smith estimates the main line at $18,000 per mile.

Rec. p. 772, fol. 1160.

The increase of $2,170 per mile over Mr. Parker's valuation would be substantially required by the increased expenditures above noted.

But Mr. Smith submits a statement showing the elements which went to make up the final valuation. Mr. Cable saw it; it was talked over; it was made at the time; it expresses the final result; it is nowhere disputed; it is as follows:

"Terminal facilities, Denver $ 700,000 Valuation.
Franchises 300,000
Terminal facilities, Pueblo 200,000
120 miles R. R. at $18,000 2,160,000

$3,360,000
Deducted arbitrarily 360,000

Aggregate value of road $3,000,000

S. T. SMITH.

Dated February 16, 1888."

The "franchises" referred to must have covered city ordinances, rights in municipal streets, including access thereby to "manufacturing establishments, warehouses and other buildings for the convenient transaction of business between the railroad on the one hand, the manufacturer and the merchant on the other." 29 Fed. R. 559.

The aggregate of the items valued is $3,360,000, and from this aggregate $360,000 is arbitrarily deducted, reducing the agreed valuation to $3,000,000.

Now, under which of these terms will the Burnham property in controversy be found? The main line *passing by* Burnham is included in the "120 miles of R. R. at $18,000"—for this measures from end to end the demised premises, but none of the grounds or improvements constituting Burnham shops as above defined is listed here, unless covered by the words "terminal facilities, Denver." What are the terminal facilities at Denver?

Here, again, the maps are useful. The Denver yard and the Burnham shops are shown by separate maps. Cable Ex. 1 and 2.

The "yard" is at the terminus of defendant's line, but the shops are some distance southerly from the terminal yard and connected with it only by the main line. A fac simile of the title of the map of Denver yard is attached hereto as Exhibit E. The map with this title was before the parties when the

Terminal yard.

contract was drafted. It is a map of the "yard" at Denver, showing tracks, connections, grounds and buildings. There was no other Denver yard.

With these two maps before them, one of the Denver "yard," the other of the Burnham "shops," the contracting parties included "terminal facilities" and excluded "shops." The terminal facilities must have meant only the terminal yard, its tracks, connections and buildings shown on this map.

The very words "terminal facilities" exclude in this case the Burnham property.

Rec. p. 1151.

Mr. E. Dickinson, a disinterested witness, was for many years a Superintendent on the Union Pacific, and at the time of testifying was General Superintendent for the Baltimore and Ohio Railroad. He knew the property in controversy, and says the shops are at least a mile and a half from the freight yards. He further testifies as follows:

Rec. p. 1153, fol. 804.

"Q. In speaking of the word 'terminals,' * * * would it be generally understood to include the shops of the company? A. Oh, no, the terminals, as we understand it in this case, would be the passenger and freight facilities for doing the business; shops are for other purposes entirely."

On cross-examination, this witness even more clearly makes this definition:

Rec. p. 1162, fol. 841.

"Q. Now, in regard to the management of union depots: what do you say the terminalfacilities of a railroad embrace? A. Why, I say the tracks and grounds necessary for the proper handling of freight and passenger business. * * *

"Q. You state that the terminal property included freight and passenger facilities. What do you mean by that? A. That would be the grounds and tracks and depot, and so on.

"Q. What tracks would it include? A. All tracks necessary for the proper handling of business.

"Q. Would it include the tracks on which cars are cleaned? A. Not unless by special arrangement.

"Q. You think that the cleaning of passenger cars at the end of a journey does not involve the use of any facilities? A. It does not involve the use of the *terminals*. The *terminals* ordinarily, as it will be understood, means the facilities for handling the freight and passenger business. If one company uses the line of another, wishes to clean its coaches, that is usually accomplished by another agreement." Terminal yard. Rec. pp. 1169-70, fol. 850.

The complainant does not attempt by any evidence or authority to controvert this railroad definition of terminal facilities.

But, again, Mr. Smith testifies that the valuation did not include any portion of the property which defendant claims to be included in the words "its shops at Burnham"; but that, on the contrary, this property was especially excluded. Rec. p. 773.

4. The designation of "Main Tracks" on the map of the "Shops at Burnham" does not aid the appellant. Shops. "Main Tracks."

The appellant in its argument at page 18, and by more extended *argument*, in the so-called "Abstract of Record," pages 50-52, contends that this designation of these tracks precludes their being a part of the "shops." It will be observed, however, that they are tracks marked on a *map of the shops*, and "main tracks," as used in the alignment notes, can here only mean *principal* tracks, shown on this map. Even counsel for appellant has not the courage to express in words the conclusion to which he would try to drive us, to wit, that they are a part of the main line of railway. Pl. Arg. p. 18. Pl. Abst. pp. 50-52.

The character of these "main tracks" can be quickly illustrated from this map of the shops.

"Main track" designated as "A" line is west of the principal shop buildings, passes the west end of the coach-house, passes between a boiler-house Rec. p. 720, fol. 1491. Rec. pp. 561-62.

Shop "Main Tracks."

and a dry kiln and terminates as a "stub" track on land used for the deposit of material.

"Main track," designated as "B" line, runs into and through the paint shop across a transfer pit, through the coach house at the side of the brass foundry, through the round-house, and then to a connection with the main line of railway.

"Main track," marked line "D," passes over the track scales, goes between the general stores and the machine shops, passes at the side of the freight car-shop, and then to a connection with line "B."

"Main track," known as line "E," starts out from line "B," passes the freight car-shop, curves to the west past the machine shop, and terminates in a "stub" at a transfer pit.

A mere glance at the map shows that these are all purely "shop tracks," although the *principal* ones among a great number of tracks similarly situated.

Tax returns

5. *Defendant's tax returns do not aid the appellant.*

Pl. Abst. p. 53.

It is true that the defendant company, in making returns to State and county taxing officers, listed all these tracks to the State Board of Equalization, and for the very good reason that, under the law cited by appellant [complainant's abstract, p. 53], *all trackage*, wherever situated and however used, is by the State Board required to be returned to it and not to the local assessor. This law does not distinguish between "*operations*" in connection with *shops* and "operations" in connection with terminals or transportation.

It is also true that the land occupied by these tracks is returned as right of way, because that term applies to the ground occupied by tracks,

whether they be main line, sidings or switches, shop or terminal tracks. Tax returns

But how does all this aid the appellant? The propriety of the "returns" for taxation made by defendant to the taxing officers is a question between the defendant and these officers alone. The appellant was not a party to them, or consulted about them; they can throw no light on the meaning of this contract. They do not in any manner give a measure of appellant's rights or liabilities.

If the defendant had charged to the appellant, and the appellant had paid taxes levied on the shop property at Burnham, counsel might at least make an argument on the ground of estoppel. There is, however, absolutely no evidence to support such a claim, although an allegation to that effect is made in appellant's Abstract of Record, page 66, and in its argument, page 20.

Counsel say:

"The contract requires the plaintiff to pay one-half of the taxes which have been assessed under these returns. They have been paid for one year." Pl. Arg. p. 20.

Neither proposition is true. The contract requires the Chicago Company to pay one-half of the taxes on the property described in Article I., Section 1, "that is, that portion of the railway and appurtenant property *used by* the Chicago Company under this contract, *excluding* shops at Burnham, and equipments, facilities and conveniences not *intended for joint use* by the parties hereto." (Contract, Article II., Section 2, Clause 7.) Rec. p. 15.

Under no circumstances can the appellant be held for *one-half* of the taxes on the property *returned*, because there is a large part of that property which never passed under the contract and can never be jointly used.

Tax returns.

The two propositions are stated in the "Abstract of Record" in this manner:

Pl. Abst. p. 65–6.

"Under the contract, the complainant was liable to the defendant for one-half of *all* taxes levied upon property so returned. Such payment was made for one year—1888."

The second proposition is as untenable as the first. The reference to sustain it is "Stipulation—Record, page 1153, fol. 780." It reads as follows:

Rec. p. 1153, fol. 780.

"It is hereby stipulated by the parties, in lieu of evidence upon the subject, that the complainant has not paid any portion of the taxes upon the property described in the agreement of February 15, 1888, except taxes for the year 1888. The adjustment of all other bills for taxes being still kept open for adjustment, there being an unsettled dispute between the parties as to some items claimed."

Here it will be observed there is no statement whatever of the amount paid, the property on which it was paid, or the basis on which it was estimated.

This was at Chicago, a thousand miles away from the offices of defendant, and near the close of the taking of evidence. Defendant's counsel gave notice to appellant, whose principal offices were in Chicago, to produce all bills rendered by the defendant relating to taxes, and all correspondence relating to the same. They never were produced, and there is not a scintilla of evidence to show that appellant ever paid a dollar of taxes on any property at Burnham west of defendant's main line, or that the defendant ever charged any such taxes against it.

Rec. p. 1153, fol. 781.

"Proposed yard."

6. The map of "Proposed Yard," near Burnham, does not aid the appellant.

Pl. Arg. 21–22. Pl. Abst. 62–65.

Counsel for appellant make an argument upon this subject, at pages 62 to 65 of Abstract, and at pages 21 and 22 of argument.

It will be observed that the argument is based

upon something which was never consummated, but upon what the plaintiff calls "a proposition." "Proposed yard."

It appears, from the testimony of Mr. Smith, that various schemes were considered for the purpose of obtaining additional facilities for the handling of trains, in the nature of a new "breaking-up" yard (Record, page 838), and among various schemes contemplated was one prepared by the engineers, which involved the purchase of land adjoining Burnham on the south, and utilizing such new purchase together with a portion of Burnham shop grounds as such a "breaking-up" yard, a purpose to which they had never before, and have never yet been, devoted. Rec. p. 838.

That this would involve the acquisition of additional grounds to the north and to the west for the Burnham shops is indisputable, as will be seen from the discussion hereafter of the extent of shop grounds required, and this particular scheme for a "breaking-up" yard was entirely abandoned, for the reason that it would destroy a portion of the Burnham shop grounds (Record, page 838, fol. 28421).

Mr. Smith testifies in reference to the map of this proposed yard as follows:

"This blue-print shows one of a number of schemes that were proposed with a view of getting additional facilities. This scheme was prepared in the engineer's office and submitted and rejected, for the sole reason that it interfered with our shop grounds, and with the other facilities which we intended to build for our machinery and car department, and for that reason it was rejected." Rec. p. 796, fol. 22780.

Speaking of the acquisition of adjoining lands south of the twenty-acre tract, he says:

"I will say this: I have always wanted to acquire that property for the Denver and Rio Grande myself. * * * I have always been in favor of that, and have recommended it numerous times, but it was for the purpose of using it for the *exten-* Rec. p. 796, fol. 22820.

"Proposed yard"

sion of our shops and shop facilities, and at thy time this scheme was proposed it was immediatele disapproved, and thereupon we proceeded south to a point near where the Fort Worth and Santa Fe road crosses our track for the purpose of building a breaking-up yard there, on ground already owned by the Denver and Rio Grande Company.

"Q. If Mr. Cable testifies under oath that you did make that proposition to him about the month of November, 1888, will you yet remain as positive as you are now that you did not? A. Yes, sir, I would; because in the first place I know that I never had any such idea in my mind, and if I did, I could not have carried it out; *I was not authorized.*"

But even if such a proposition were made to Mr. Cable by Mr. Smith, how does it affect this contract? If the contract which was authorized and executed under the authority of the Board of Directors, and with the ratification of the stockholders of both companies, excluded these grounds as a part of the shops, then nothing which Mr. Smith individually could propose or say upon the subject subsequent to the making of the contract would change the rights of the parties to this agreement.

Moreover, if such a proposition had been made by Mr. Smith, and the project were carried out, it does not thereby involve the construction of the contract for which counsel is contending, for the scheme contemplated the acquisition of new ground from other proprietors, and if the twenty-acre tract was not within the terms of the original contract, would contemplate the subsequent acquisition by the Rock Island Company of an interest in that property also. The proposition, even if made, is entirely consistent with the fact that the Chicago Company had not by the contract acquired any interest in this property, because there is nothing in the proposition or scheme as advanced in-

compatible with the proposition that any and all lands required for the scheme were to be subsequently obtained by new contract for joint use for that purpose. But all the testimony of Mr. Smith in this connection supports the proposition of the defendant, that all this property included within the twenty-acre tract was by him considered as a part of the shops. In addition to that heretofore quoted, he again says: "Proposed yard."

"It was a mere matter of information, and I know very well that I did not invite him to consent to the purchase of it. Rec. p. 838, fol. 2441.

"Q. The Bailey ground, I mean. A. For the Bailey ground—because by using the grounds for tracks as suggested by himself and others at that time, that it would destroy a portion of our Burnham shop grounds which was required for the additional facilities that we hoped to be authorized to put on it in a very short time, and the scheme was abandoned, as I stated yesterday."

It appears moreover by the evidence that Mr Smith had not the power, himself, to purchase for the defendant the adjoining land required by this alleged scheme, and therefore he did not have the power to determine upon such a scheme at all. He states that for the purpose of using the adjacent land for the extension of *shops* and *shop facilities*, he had made an application for authority to purchase, but that action upon this application had been deferred from time to time. Rec. p. 796–7, fol. 2282–3. Rec. p. 838, fol. 2442.

The authority here referred to must manifestly come from the Board of Directors of the company. They never authorized the purchase of the adjacent land, and therefore never authorized the scheme of this yard, which would involve the use of the Burnham shops.

In this connection, we wish to express our emphatic protest against the so-called "Abstract of Record" filed by the appellant in this case, and the

"Proposed yard."

map accompanying the same. This "Abstract of Record" is really an argument on behalf of the plaintiff. In many places the effect of the testimony, *as construed by the plaintiff*, is presented instead of the testimony itself. The effect of the contract from the same partisan view is presented instead of the language of the contract, as we have already had occasion to say as to sundry passages, and will have occasion to say again in the further progress of this argument.

Complainant's "Abstract of Record."

The map which is attached to this "Abstract of Record" does not represent anything which was submitted as a map in the taking of evidence, but is a combination made by the appellant's counsel of parts of various maps, thereby distorting the appearance of the whole. A partial map of the "proposed yard," taken from Middleton Exhibit No. 3, is placed upon a reduced copy of Cable Exhibit No. 2. Both are combined with Smith Exhibit No. 20. This conglomerate production might be prepared as a portion of an argument to illustrate some point that counsel chose to present, but to attach it to an "Abstract of the Record" as representing anything that was produced in the testimony amounts to a gross misrepresentation. No such map as is here attached to this Abstract of Record was ever before the Court below or ever prepared by any of the parties to the suit.

Wolcott map.

7. *The map produced by Mr. Wolcott at Chicago does not aid the plaintiff's contention.*

In the discussion of this subject, we must first call attention to another perversion of the testimony in the "Abstract of Record," prepared by plaintiff.

At page 40 of the Abstract, counsel states the evidence as follows:

"At the interview between Mr. Wolcott and

Mr. Withrow at Chicago, about the 17th of December, Mr. Wolcott produced a map showing the property at Burnham, and said to Mr. Cable that he assumed that we would not want to use their shops, and that they would want to reserve the shops for their own use. He called Mr. Cable's attention *only to the structures* which were indicated on the map, without pointing out any ground adjacent to the shops." Wolcott map. Pl. Abst. p. 49.

Counsel then, in this Abstract of Record, suggest that this testimony is from Cable's affidavit, and that Mr. Wolcott by another affidavit answered that of Mr. Cable without making any mention of this subject.

The evidence is not found in Mr. Cable's affidavit. It is found in his oral testimony as a witness. Mr. Wolcott's affidavit was in response to the Cable affidavit, and not in response to matters which Mr. Cable testified to on the stand (Record, page 699, fol. 1010; Record, pages 930 to 943).

And it is not true that the testimony of Mr. Cable shows that Mr. Wolcott called attention to the *structures*, although counsel diligently endeavored to obtain such a response from a very willing witness. The testimony is as follows:

"Q. What circumstances called your attention to the shop buildings on the map? A. Mr. Wolcott, in the discussion, said he assumed we would not want to use their shops, and they would want to reserve the shops for their own use, and showed them to me in blue-print which he exhibited. * * * Rec., p. 699, fol. 1010.

"Q. You may state whether or not at or before that time, or at any time, Mr. Wolcott, or any other officer of the Denver and Rio Grande Railroad Company pointed out any ground adjacent to the shops for the purpose of indicating that they were excluded in the description of the shops at Burnham, and that there was an intention to re-

Wolcott map.

serve them in the operation of the contract if made. A. No, sir; they never did."

It will be observed that the expression "shop buildings" is used only by the questioner, and that when Mr. Cable answers the question the only expression he attributes to Mr. Wolcott is that he assumed "we would not want to use their shops, and they would want to reserve the shops for their own use, and showed them to me in blue-print which he exhibited."

Under what theory of fairness can the plaintiff's counsel state, under this evidence, that attention was called by Mr. Wolcott only to the *structures?* The language which Mr. Cable himself gives to Mr. Wolcott is the language of the contract, and Mr. Wolcott is not shown to have said a word on the subject of structures, or as to what he meant by the word "shops."

The map before the parties at that time was, manifestly, a blue-print of this same map of "Railway shops."

Rec. p. 700, fol. 1014–5.

Burnham wye.

8. *The location of the "wye" at Burnham does not affect the question.*

It appears from the evidence that, subsequent to the making of this contract, a "wye" was temporarily located upon the twenty-acre tract. After the construction of this wye, it was used for the turning of both Rock Island and Denver and Rio Grande Railroad trains, and disputes arose as to charges for compensation for that service. This dispute was settled by agreement, so far as the wye itself was concerned, on the theory that a facility of this character should be had at some place, and that, having been constructed on the twenty-acre tract, the wye itself should be used as joint property until a substitute was given at some other con-

Rec. p. 1280.

venient place. Under these circumstances, an agreement was made, which is at page 1280 of the Record, and which was signed by representatives of the two companies, as follows: Burnham wye. Rec. p. 1280.

"*Turning trains on Burnham wye:*

"It was agreed to add the cost of construction of the Burnham wye to original valuation, on which the Rock Island will pay the regular rate of interest from November, 1888; this not to include value of land on which the wye is located. The bills rendered for turning trains shall be canceled in view of above, and that this statement is made without prejudice to the question as to whether land on which the wye is located is joint property or not."

The decree recognizes this arrangement by first adjudging that the land on which the wye was situated did not pass under the contract, but further providing that the complainant should not be excluded from the use of this wye so long as it paid interest on its value "unless and until the defendant shall provide at Denver another wye track for the turning of such engines, cars and trains." Rec. p. 1261.

Under the circumstances shown by the Record, therefore, the subsequent construction of this wye track cannot in any way affect the question as to the meaning of the contract itself, or as to the extent of property included in the words "shops at Burnham."

9. *The coach track belongs to the shops.* Coach track.

This coach track is situated in the very midst of the great number of tracks which run through and about the shop buildings, and upon the very ground which was first bought in 1871 as the original shop grounds. It runs at the side of the paint-shop; it is called a "coach" track, because defendant

Coach track.

company has been in the habit of standing coaches there for the purpose of cleaning and making slight repairs. All the argument of the preceding propositions must show that this was necessarily excluded, as no exception was made in favor of the appellant as to this track or any specific track.

The appellant cannot claim that it must have this particular track on the ground that it must have some facility on which to clean its cars at or near Denver, because the contract specifically provides that if it requires any such additional facility it may call upon the Denver Company to construct it, or it may itself construct such additional facility and have it for its exclusive use.

Rec., p. 17.

The rights of the Chicago Company under the contract are fully protected without requiring the defendant to yield any one of the particular tracks located at its shops for the use of that company for any purpose.

Meaning of "shops."

10. The meaning of the word "shops" supports the defendant's contention.

In view of the number of reasons heretofore urged, which support defendant's contention as to the scope of the word "shops" as used in the contract, it seems unnecessary to go into the subject of testimony upon the meaning of the word, yet a large amount of testimony was submitted by both parties upon the subject. The testimony is conflicting. The appellant in that part of the argument denominated an "Abstract of Record" has set forth by quotation various definitions given by its own witnesses.

We call attention to a few definitions given by witnesses for the defendant.

Mr. Burns, Superintendent of Transportation

for defendant company, and formerly connected with The Union Pacific, defines it thus: Meaning of "shops."

"In speaking of railroad shops, in railroad parlance, the shops will be known to include the round-house—that is, the engine-house—the machine-shops, boiler-shops, blacksmith-shops, store-house, paint-shops, carpenter-shops, wood-working-shops, and also ice-house or ice-houses and scrap tracks and yard tracks for holding engines and cars for repairs; all switchings, sidings and track adjacent to the shops on the shop grounds." Rec. p. 539, fol. 1272.

Mr. Hawksworth, Superintendent of Motive Power for the Burlington and Missouri River Railroad, defines it thus:

"Well, the word 'shops,' of course, would include the shops and all repair tracks, *shop yards* and everything pertaining to large shops—the main shops." Rec. p. 647, fol. 1706.

Counsel try to confuse this witness by comparing the reservation in this contract with a case of sale of land and the reservation of a house, and the following conversation occurs:

"Q. Suppose a man who owns a property sells the land, reserving the house, how much does he reserve? A. He would reserve the house. Rec. p. 658 top 1754.

"Q. Wouldn't the land go with it? A. No.

"Q. Then, suppose he sells a railroad, reserving the shops, how much of the land goes with the shops? A. The *shop grounds*.

"Q. Now, Mr. Hawksworth, if a man sells fifty acres, reserving the house, he gets nothing but the house; that is the way you want to be understood? A. He gets nothing but the house.

"Q. But if he sells a railroad, reserving the shops, he gets a large bit of land with the shops? A. That is customary in railroading.

"Q. That is your understanding of this whole question? A. That is about it.

"Q. That the reservation of a shop carries with it a large body of land, and the reservation of a house don't carry any land with it? A. Yes."

The Court below seems to have had the same opinion, and very decidedly agreed with this witness.

Meaning of "shops."

Rec. p. 1412

"It is obvious that the term 'railroad shops' includes much more than would be included in the term of shoe-shop or tailor-shop. Commonly, the word "shop" means a building inside of which a mechanic carries on his work, but by far the greater portion of all principal railroad shops such as the parties to this contract had in contemplation are without a covering."

"The plaintiff seeks to construe this exception as though it read 'the buildings on the shop grounds,' but that would be to change its whole meaning."

Mr. Palmer, a Superintendent on the Union Pacific system, defines the word as follows:

Rec. p. 1296, fol. 1734.

"I would consider it, in speaking of the shops, the *grounds* and tracks necessary for the operation of the shops; that it would cover that, at least; that is the way I would term it."

Mr. Campbell, Superintendent of the B. and M., says of the shops:

Rec. p. 1278, fol. 1501.

"We include all the yard and grounds surrounding it."

General Manager Smith says:

Rec. p. 748, fol. 2144.

"It would include the grounds, tracks, buildings and structures appurtenant to the operation of the shops."

On cross-examination he says:

Rec. p. 824, fol. 2410.

"By the words 'railroad shops' I would mean the shop grounds, buildings, tracks and appurtenances.

"Q. Do railroad shops include any structures or tracks in use in the manufacture or repair of equipment or the appliances used in the construction or operation of railways? A. Yes, sir. They generally cover stores, store-houses, houses for car cleaners and inspectors and oilers.

"Q. Do you know that that is the sense in which railroad men, railroad officers and employees generally use and understand the words 'railroad shops'? A. Yes, sir, I do."

Mr. Sample, Superintendent of Motive Power and Machinery for defendant, says:

Rec. p. 724, fol. 2004.

"The term includes the shops and grounds, tracks, sheds and lumber yards and everything appertaining to the manufacture and repair of cars."

Meaning of "shops."

The principal witness for the complainant on this subject makes a definition that is absurd in its narrowness. Mr. Charles C. Wheeler, in behalf of complainant, testifies as follows:

Rec. p. 952, fols. 2 and 3.

"Q. Do the words 'railway shops' alone signify anything beside buildings? A. I think not.

"Q. You will please state whether or not tracks that run *into* the shops and are used *exclusively* for *construction and repairs* are a part of the shops or otherwise. A. They are not a part of the shops, and not a part of the buildings."

This definition is even narrower than the very narrow construction adopted by plaintiff in argument, to wit, "the structures and land lying under them."

Ill. Arg. p. 73.

The language of this exception, when considered with the general language of the grant, is inconsistent with this narrow construction.

Status of Defendant.

11. The situation of the defendant and of its property at the time of making the contract shows that the entire grounds at Burnham, west of the main line, were excluded from the contract.

The Denver and Rio Grande Railroad started its construction from Denver south, in about the year 1871, and at that time purchased its first shop grounds, being the original tract designated as "shop grounds" in the list of property appended to Cable Exhibit 2, and which have since been known by that term, because of that appellation when these grounds were first procured, now twenty years ago.

Rec. p. 720, fol. 1986.

As the railroad increased and its consequent necessities increased, it procured additional grounds for its shops. It bought the twenty-acre tract in 1881; it bought the Burlingame tract in 1887, as extensions of its grounds devoted to and intended for shop purposes.

Rec. p. 719–21.

At the time of the making of this contract, the Denver and Rio Grande Railroad had a system of

Status of Defendant.

railway then amounting to about 1,500 miles, which was then growing, and has ever since been growing. The shops at Burnham were the main shops of its system. The shops at Pueblo, which counsel mentions, were mere repair shops at a division point. The line included in this contract was only 120 miles out of the entire 1,500 miles.

In accordance with the usual custom and the usual necessities of railroad companies, the main shops of a system of the extent of this would require an amount of ground fully equal to or exceeding the entire tract claimed by the defendant to have been excluded under the words "its shops at Burnham."

A conveyance of any considerable portion of this land and the consequent restriction of the main shops to a small area of ground would necessarily cripple it in the performance of its work for its entire system as then existing, and would require, as its system grew, the establishment of new shops elsewhere, where it could have a greater area of land, and which could only be obtained at an expense of more than a million dollars.

This condition of affairs must have been apparent to Mr. Cable, as the representative of the Chicago Company, and the man with whom the negotiations for this contract were carried on, and, as a railroad man, he must have known the necessities of the defendant company in the matter of shops.

This situation of the defendant and of the property at the time this contract was formulated clearly shows what must have been the intention of the parties in the use of the words "excluding its shops at Burnham."

We respectfully submit that the decree of the Court below upon this question should be affirmed.

The foregoing discussion covers the principal points in the decree in this case from which the appellant has appealed.

There are one or two minor points which will be incidentally treated in the discussion of matters from which the Denver Company appeals.

We now proceed to the discussion of the defendant's assignment of errors.

III.

THE COMPLAINANT HAS NO RIGHTS ON DEFENDANT'S RAILWAY, AS SUCCESSOR IN INTEREST OF THE CHICAGO COMPANY, UNDER THE CONTRACT OF FEBRUARY 15, 1888.

1. Complainant has no valid paper title. Paper title.

The provision of the contract upon this subject is as follows:

"This contract shall attach to and run with the railways of the respective parties; * * * *Provided, however*, That the Chicago Company can assign its interests in this contract *only by sale, lease or consolidation of its own property*." Rec. p. 22.

There has been no consolidation of the property of the Chicago Company with that of the complainant. There has been no sale of the property of the Chicago Company to the complainant. No such consolidation or sale is claimed. The title asserted by complainant is under an alleged *lease*. The question is whether, under the facts disclosed by this Record, the line of the Chicago Company, being the line mentioned in the contract, is subject to a lease held by the complainant.

The history of complainant's alleged title is as follows:

The Chicago, Kansas and Nebraska Railway Company, herein called the "*Old* Kansas Company," by its original articles of incorporation, dated

Paper title. March 17, 1886, and amendments thereof dated March 29, 1887, had power to own and construct
Rec. pp. 165-67. railway lines in Kansas and Nebraska, and not elsewhere.

On May 15, 1886, the Old Kansas Company leased its line to the St. Joseph and Iowa Railroad Company, the leased premises, as described in the instrument, including the following:

Rec. p. 172. "All of the railroad which is now or may hereafter be owned by it (the party of the second [first?] part), and extending over the lines described in the preamble hereto, together with all the rights, privileges and franchises of which it, the said party of the first part, is now possessed, or which may hereafter inure to it with regard to said railway or any extensions thereof, or branches therefrom."

Rec. p. 169. The preamble above referred to includes the lines of the Old Kansas Company described in its articles of incorporation (Record, page 160).

This is the lease under which the complainant now claims to control the Chicago Company's line, mentioned in the contract with the defendant. There is no other lease.

On January 31, 1888, the Chicago, Rock Island and Colorado Railway Company was organized under the laws of Colorado, with power to construct a line in the State of Colorado and not elsewhere. This line was to connect with the railway of the Chicago, Kansas and Nebraska Railway Company (the Old Kansas Company), on the eastern boundary of the State of Colorado (Record, page 177).

Rec. p. 177.

Under date of June 13, 1888, the Old Kansas Company and the Chicago, Rock Island and Colorado Railway Company were consolidated under the laws respectively of Kansas and Colorado. Article VIII. of the Articles of Consolidation provided that the lease executed by the Old Kansas

Company to the St. Joseph and Iowa Railroad Company, bearing date May 15, 1886. Paper title Rec. p. 186

"Shall extend to and embrace all property which is now or which may hereafter be constructed or in any manner acquired by the consolidated corporation in the States of Kansas and Colorado * * * as fully and to the same extent as if embraced by particular description in said contract of lease."

Under date of December 20, 1888, the St. Joseph and Iowa Railroad Company conveyed to the Chicago, Rock Island and Pacific Railway Company, the complainant herein, all its rights, franchises, powers, etc., together with all its railway in the State of Missouri, and all the railway which it was authorized by law to construct and all branches and extensions thereof. Rec. p. 188

"And including, also, all right, title, interest or claim of said first party in and to the railway, property, rights, privileges, franchises and immunities of The Chicago, Kansas and Nebraska Railway Company, which said first party has acquired or may hereafter acquire under and by virtue of the said indenture of lease entered into between the said St. Joseph and Iowa Railway Company and The Chicago, Kansas and Nebraska Railway Company." Rec. p. 191

Under date of December 31, 1888, the St. Joseph and Iowa Railroad Company and The Chicago, Kansas and Nebraska Railway Company (the consolidated company) purported to transfer and assign to The Chicago, Rock Island and Pacific Railway Company, the complainant, the contract between the Chicago Company and the defendant, bearing date February 15, 1888, and also the lease above mentioned, dated May 15, 1886. Rec. pp. 193–6.

This constitutes the so-called "paper title" of the complainant, as successor in interest of the Chicago Company to the rights given to the latter company by the contract with the defendant of February 15, 1888.

Paper title

Upon these facts, it is our contention that the complainant has not acquired an interest in this contract.

The assignment of December 31, 1888, above mentioned, would not transfer any interest because such assignment is especially prohibited by the contract which restricts the Chicago Company to transfers by sale, lease or consolidation of its own property.

The only question left relating to the alleged paper title is as to whether the lease of May 15, 1886, made by the Old Kansas Company to the St. Joseph and Iowa Company, attaches to the line of the Chicago Company, described in our contract, so as to give the St. Joseph and Iowa Company a leasehold interest in the Chicago Company's line, and this we confidently deny.

C., K. and N. lease.

Rec. p. 163.

(*a*) At that time, May 15, 1886, the Old Kansas Company had no power under its charter to build in Colorado (see articles of incorporation, Record, page 163). There was no change in its powers in that regard up to the time of its merger into the consolidated company. This lease had been made nearly two years before the incorporation of the Chicago Company, and more than two years before the consolidation.

The statute of February 12, 1887, does not aid the complainant on this question. It left unaffected the provision of the existing statute of Kansas requiring the termini and route of railroads to be designated in the articles of incorporation. (See Appendix.) The Old Kansas Company amended its articles of incorporation subsequent to the act of February 12, 1887, to wit, March 29, 1887, and made no provision therein for an extension into Colorado, or acquisition of lines therein. In any event, however, this statute cannot be invoked, be-

Rec. pp. 165-67.

cause the *Old Kansas Company* never availed itself of that statute to build or acquire a line in Colorado, as will hereafter more fully appear. Paper title. C., K. and N. lease.

In June, 1888, the Old Kansas Company, whose property was then subject to the lease to the St. Joseph and Iowa Company, consolidated with the Chicago Company, thereby forming a *new corporation*, which, however, took the name of one of the constituent companies, to wit, The Chicago, Kansas and Nebraska Railway Company. It was, nevertheless, an entirely new, distinct and separate corporation. (See Colorado statute relating to consolidation of corporations, printed in appendix.) Rec. p. 181.

Pullman Car Co. vs. Mo. P. Co., 115 U. S., 594.

It is a principle of the law of consolidation of corporations, under statutes such as that of Colorado, that the property of each of the companies goes into the consolidation in the condition in which it was in the hands of the constituent company. A mortgage of the lines of one company would not, by virtue of the consolidation alone, extend over the property brought in by the other constituent company. An exemption from taxation of the property of one would not by the consolidation extend to the other, and by a parity of reasoning, a lease made by one company before the consolidation would not extend to the property of the other merely by virtue of the consolidation. The respective companies go into the consolidation from a position of independence and legal equality. Neither of the old companies *acquires* the property of the other, but a new corporation acquires the rights and property of both, in the condition and subject to the burdens under which the constituent companies held their respective parts. This Court, in speaking of the exemption Pullman Co. vs. Mo. Pac. Co., 115 U. S., 594.

Paper title.

from taxation enjoyed by one of two consolidating companies, after citing various cases, uses this

C., K. and N. lease.

language:

R. R. Co. vs. Virginia, 94 U. S., 726.

"In most, if not in all, of these cases, the statutes which authorized the consolidation or union of the companies declared that the consolidated or united companies should possess all the rights and privileges which each of the companies enjoyed under its charter. Yet it was ruled that those rights and privileges *did not extend beyond that portion of the aggregated property which each had held under its charter.* * * *.

"The consolidated corporation would have acquired, as we have seen, no greater immunities from taxation than the constituent companies had prior to the union, but would have held them *distributively;* that is to say, whatever privileges and advantages either of them possessed would have been held by the new company to the extent of the road occupied by each respectively upon the consolidation. It would have stood in their place, and have possessed the powers, rights, privileges and immunities the constituent companies had severally enjoyed *in the portions of the road which had previously belonged to them.*"

Chesapeake, etc., R. R. Co. vs. Virginia, 94 U. S., 726.

So, speaking of a contract for the hauling of cars, this Court has said in another case:

Pullman Co. vs. Mo. Pac. Co., 115 U. S., 587.

"The new company assumed on the consolidation all the obligations of the old Missouri Pacific. This requires it to haul the Pullman cars under the contract on all roads owned or controlled by the old company at the time of the consolidation; but it does not extend the operation of the contract to other roads which the new company may afterward acquire. The power of the old company to get the control of other roads ceased when its corporate existence came to an end, and the new company into which its capital stock was merged by the consolidation undertook only to assume its obligations as they then stood. It did not bind itself to run the cars of the Pullman Company on all the roads which it might from time to time itself control, but

only on such as were controlled by the old Missouri Pacific." Paper title

Pullman Car Co. vs. Missouri Pacific Railway Co., 115 U. S., 595.

In a later case upon the Circuit, Mr. Justice Brewer (then Circuit Judge), in discussing the same principle, cited the case above mentioned, and said:

"So the power of the St. Joseph and Council Bluffs Railroad Company to lay new tracks or to acquire the right to lay any tracks within the city of St. Joseph or anywhere else, ceased upon the consolidation. Whatever rights were thereafter acquired were acquired by the new company; and, while it took all the burdens that rested upon the old, it took them as *they were limited* at *the time the consolidation took place*." 38 Fed. Rep., 61

C., St. P. and K. C. Ry. vs. K. C., St. J. and C. B., 38 Fed. Rep., 61.

Upon the authorities hereinabove cited, it is apparent that the line of the Chicago Company which is brought into the consolidation does not form an *extension* of the line of the Old Kansas Company, being the other constituent Company, and the obligations of the Chicago Company must only be such as were incurred by it as one of the separate constituent companies, or which were incurred by the consolidated company after that consolidation was formed.

The complainant's position is not aided by the quotation made at the bottom of page 4 of its argument, from Article III., Section 11, of the lease to the St. Joseph Company, where it is provided that the lease shall attach and run with the railway and appurtenant property and franchises of the party of the first part. Pl. Arg., p. 4.

The party of the "first part" here mentioned is the Old Kansas Company; it is not the new consolidated company, nor is it the Chicago Company,

Paper title.

and the Old Kansas Company expired in the organization of the new company in June, 1888, and the old Kansas corporation never, at any time, had any interest in the Chicago Company's line.

Consolidation.

Rec., p. 185

(*b*) It is, however, contended by the complainant that the very articles of consolidation recognized this lease (Articles of Consolidation, Article VIII., Record, page 1801), and that, therefore, the property brought by the Chicago Company into the consolidation became subject to this lease to the St. Joseph and Iowa Railroad Company. This position is untenable for various reasons:

(1) There was no existing lease of the Chicago Company's line at the time of entering the consolidation. Before the consolidation that company had not attempted to subject its property to this or any lease; after the consolidation, the consolidated company did not lease its property. In the act of consolidating, the Chicago Company did not *lease* its property, because none of the statutory provisions relating to leases were then followed: (See Colorado statute on the subject of leases, in Appendix.)

(2) The St. Joseph and Iowa Railroad Company was not a party to the articles of consolidation, and has never by corporate action become the lessee of the Chicago Company's line, or entered into any covenants whatever with the Chicago Company, or with the consolidated company.

(3) It is a well settled law that a railroad company holding its franchise under governmental authority cannot lease its property except as thereunto authorized by law.

Gen. Stat. Colo., Sec. 980

(4) The statutes of Colorado prohibit a lease except under certain conditions and notices which were not complied with in this case. Thus, the lease shall be,

"Upon such terms and conditions as may be *agreed upon between the companies.*" (General Statutes of Colorado, 1883, Section 360.) Paper title. Consolidation.

There was never any agreement between the St. Joseph and Iowa Company, the lessee, and the Chicago Company, or the consolidated company.

It is further provided that no such lease shall be perfected until a meeting of the stockholders of *each* of the companies has been called *for that purpose* on thirty days' notice to each of the stockholders, and in such manner as is provided for annual stockholders' meeting, and the holders of at least two-thirds of the stock of each company, in person or by proxy, at such meeting assent thereto. (General Statutes, Section 361). Gen. Stat. Colo., Sec. 361

No meeting of stockholders of either the Chicago or the consolidated company was ever held *for the purpose* of making a lease; no meeting of the stockholders of the St. Joseph and Iowa Company was ever called for the purpose of accepting a lease of the Colorado line.

In the notice of meeting of stockholders of the Chicago Company, there is no suggestion of a purpose to lease the company's line.

There was, therefore, an absolute failure to subject the Chicago Company's line to the lease theretofore made by the Old Kansas Company to the St. Joseph and Iowa Railroad Company.

2. *The defendant is not estopped from denying the complainant's title.* No estoppel.

(a) The defendant has had nothing whatever to do with the corporate transactions of the Chicago Company, the Old Kansas Company, the consolidated company, the St. Joseph and Iowa Company, or the complainant; and any action taken by these companies, either separately or in their deal- No privity

No estoppel.

ings with each other, can in no manner affect the defendant, not being a party thereto. It is manifest that any action on the part of the officers of the defendant company prior to the consolidation of the Chicago Company with the Old Kansas Company, and any knowledge which the defendant company or its officers had of the relations of the complainant to the other companies named, prior to such consolidation, can have no bearing on the question in controversy, because it was clearly contemplated that if the complainant acquired an interest in the Chicago Company's line it would do so regularly, in the manner provided by the contract, to wit, by sale, lease or consolidation of the Chicago Company's property.

The defendant company, not being a party to the consolidation proceedings between the Chicago Company and the old Kansas Company, is not estopped by anything that transpired in that consolidation.

Any elements of estoppel, if they exist, must be found in the relations of the defendant company to the complainant subsequent to the consolidation.

Basis of action.

(b) From the time of the consolidation, business was transacted with the defendant in the name of the Chicago, Kansas and Nebraska, the consolidated company. That was the only designation officially known to the defendant for the company succeeding to the Chicago Company's rights, until May, 1880. The defendant in issuing its time-cards upon information furnished to it by the Chicago, Kansas and Nebraska Company, designated the trains of the latter company as "Chicago, Kansas and Nebraska Express," "Chicago, Kansas and Nebraska Mail" (Record, page 1231), with no recognition of any other company as a lessee. In that month, at the request of complainant's officers, the

Rec. p. 1231

caption was changed to "Chicago, Rock Island and Pacific." A notice was issued under date of May 16th, stating that the Chicago, Rock Island and Pacific Railway Company, the complainant, had assumed operation of the Chicago, Kansas and Nebraska Railway (Smith's Exhibit No. 72, page 408, Record). This notice coming to the hands of the law department of the defendant in July, a letter of inquiry was addressed to Mr. Low, President of the Chicago, Kansas and Nebraska Company, inquiring what company was then controlling the Colorado line and under what arrangement, and on the 25th of July, Mr. Low answered that the Chicago, Rock Island and Pacific Railway Company was operating the line of the Chicago, Kansas and Nebraska Company *under a lease* (Vaile Exhibit 73, Record, page 408).

No estoppel.

Basis of action.

Rec. p. 408.

Rec. p. 408.

Upon this information, which was the first official information as to the change of relations, the managing officers of defendant company recognized the complainant as the successor in interest under the contract, assuming that the lease had been made in accordance with the terms of the contract (Vaile's evidence, Record, page 351), that the lease referred to was the old lease of May 15, 1886, did not become known to the defendant until the institution of this suit, when it was discovered by the allegations of the bill of complaint (Vaile deposition, Record, page 360).

Rec. p. 351.

Rec. p. 360.

The fact that the Chicago, Kansas and Nebraska Company in its dealings with the defendant used stationery which had marked upon it "St. Joseph and Iowa Company, Lessee," can certainly not be considered binding upon the defendant company, as no duty rested upon it to observe what sort of heading the Chicago, Kansas and Nebraska Company was using; and it is expressly testified by Mr.

No estoppel.

Rec. p. 1149.

Basis of action.

Rec., pp. 1149-50.

Jilson, of the complainant company, that the way bill heading which was used by the Chicago, Kansas and Nebraska Company as late as June, 1880, was the old, printed form that had been used in 1887, which was prior to the organization of the Chicago Company (Record, page 1149), and that this old stationery continued to be used for upwards of four months after the transfer from the St. Joseph and Iowa to the Chicago, Rock Island and Pacific (Record, pages 1149 and 1150).

It is also claimed by the complainant that this lease of the old Kansas Company to the St. Joseph and Iowa Company was in the hands of Wolcott & Vaile in January, 1890, and that that firm had knowledge of the character of the lease by reason of certain correspondence relating to an ejectment suit of one Beatty, against the Chicago, Rock Island and Colorado Railroad Company *et al.*

Rec., p. 372.

The defendant was not in any way interested in or connected with that case. George W. Easley, who managed that case for Wolcott & Vaile, was not an officer or employee of the defendant. Wolcott & Vaile were engaged in a general law practice. The senior member of the firm, it is true, was the general counsel for the defendant company. He, however, never saw the document. Neither, for that matter, did his partner in business (Vaile's evidence, Record, page 372).

Under these circumstances, the defendant is not bound by any notice to the attorneys employed by it, when that notice comes to such attorneys in the business of other clients not related to the business of defendant.

Ford vs. French, 72 Mo., 250.

Ford vs. French, 72 Mo., 250.

Law of estoppel.

(c) Estoppels are not favored in law. To create an estoppel in this case, the defendant must have known the true facts, and yet neglected to

avail itself of that knowledge. It did not know the real facts until the filing. No estoppel.

To create such estoppel the complainant must have been induced to some particular course of action, and changed the status it would otherwise occupy, in reliance upon some action of defendant. This it has not done. Law of estoppel.

At least two of the five necessary elements of estoppel *in pais* are wanting in this case.

5 Cent. L. Jour., 151.
Jones vs. Sasser, 1 Dev. & Batt., 452, 464.
Henshaw vs. Bissell, 18 Wall., 255, 271.
Freeman vs. Cooke, 2 Exch., 654, 663.
Leather Mfr's Bank vs. Morgan, 117 U. S., 96, 108.
Brewer vs. B. and W. R. R. Co., 5 Metc., 478.
Bank Hindustan vs. Alison, L. R., 6 C. P., 54.
Steel vs. Smelting Co., 106 U. S., 447.
Benevolent Soc. vs. Baldwin, 86 Ill., 479.
Brant vs. Va. C. I. Co., 93 U. S., 326.

In any event we respectfully submit that the rights of corporations under contracts formally entered into by their Boards of Directors, and which for their validity require the action of the Boards of Directors and even of the stockholders, as did this contract, cannot be changed in their scope or effect by the action of mere executive officers of one of the companies. And the acquiescence for a short period of subordinate officers of the defendant company, and even of its General Manager, in the claim asserted by the complainant to a right under this contract, will not create such a right, and will not estop the defendant company from insisting upon a strict compliance with the conditions of the contract.

No estoppel.

Dixon County vs. Field, 111 U. S., 94.
2 Morawetz, Sec. 614.

Justice Miller's opinion should not, on this question, affect the present hearing.

The argument before Justice Miller was on short notice, on the application for a temporary injunction, with an incomplete knowledge of the facts and upon a different state of the issues.

His opinion, however, is not positive or absolute.

The decision says:

"If there was any doubt upon that branch of the subject, it would, *perhaps*, be removed, for the purposes of this suit, at all events, by permitting the complainant to exercise rights under the contract."

The Justice was in error as to the facts when he said in his opinion that these rights had been exercised several years. They had been so exercised only a little over one year, to wit, from June, 1889, to July, 1890, inclusive, and for almost the entire period had been permitted by the defendant company under the erroneous information conveyed by Mr. Low's letter of July 25, 1889.

Justice Miller did not have before him the facts now disclosed by the amended answer and the evidence relating to inquiries on the subject of the complainant's relations to the property.

The Court below, in paragraph number one of the final decree, finds that the complainant is the successor in interest of the Chicago Company under the contract. From this part of the decree the defendant has appealed, and the matter is presented by its first assignment of error.

Upon the facts above set forth, and under the legal principles by which they must be interpreted, we insist that on this point the Court below was in error, and that the decree should be so modified as to find that the complainant has no right, as a suc-

cessor in interest of the Chicago Company, to operate its trains over the line of the defendant company.

IV.

THE COMPLAINANT COMPANY HAS NO RIGHT UNDER THE CONTRACT TO PUT INTO THE DENVER TERMINALS ITS OWN SWITCHING ENGINES, SWITCHING CREWS, AND OTHER EMPLOYEES DEVOTED TO ITS EXCLUSIVE SERVICE.

1. The contract does not contemplate such separate service.

The contract in its very letter would seem to sufficiently sustain this contention on the part of the defendant. The Denver Company was in the possession of and operating the line, including side-tracks and terminals, at the time of entering into the contract. The contract did not contemplate any cessation or diminution of that use by the defendant. Contract.

Schedules of rules and regulations were, under the contract, to be executed under the immediate direction of the Superintendent, or other officer duly authorized, of the Denver Company (Article III., Section 21). Rec. p. 18.

When we consider the provisions of the contract relating to the compensation to be paid by the Chicago Company to the Denver Company, there seems to us little room for doubt upon the question here presented.

Article II., Section 2, recites the sums that are to be paid by the Chicago Company for the privileges granted to it, and the monthly payment is stipulated to be the sum of certain amounts. The first is interest at the rate of two and one-half per cent. per annum; the second is a similar pay- Rec. p. 14.

Contract.

ment of interest on the cost of additional construction; the third is interest upon the cost of constructing and repairing round-houses for the exclusive use of the Chicago Company; the fourth is a proportion, based on wheelage, of the expense of keeping the railway and appurtenant property in repair, and supplying the Chicago Company with water; the fifth, the actual cost of coal delivered to the Chicago Company. The sixth is as follows:

Rec., p. 15.

"An amount equal to a proportional share of the expenses actually incurred in paying proper salaries to the General Superintendent and subordinate employees, including *switchmen*, telegraph operators, train dispatchers, and others necessarily employed in the performance of the duties incident to the joint use and occupation of said railway, not including trainmen, which proportion shall be ascertained in the manner provided in paragraph number four, above set out."

Rec., p. 15.

The seventh is one-half the taxes. The eighth is one-half the rentals received by the Denver Company from other companies. The ninth clause of this section provides that the Chicago Company may require from the defendant "copies of the pay-rolls and vouchers, showing the payments of the expenses mentioned in the foregoing paragraphs four, five and *six*, certified to be correct and true by the General Manager, or other officer of the Denver Company," to be submitted as evidence of the amount actually due.

The sixth and ninth clauses of this section show that it was the intention of the contracting parties that the Denver and Rio Grande Railroad Company should carry upon its pay-rolls, and should, in the first instance, pay the *switchmen*, as well as telegraph operators, train dispatchers, and others employed in the performance of the duties incident to the joint use and occupation of the railway; and that, having so paid them, the Chicago

Company should repay to the defendant its proportional share of these expenses, based on wheelage between Denver and Pueblo. Contract.

Under any other view of the contract, its terms can not be carried out.

If the defendant pays only the Denver and Rio Grande switchmen in the terminal yards, the complainant certainly would not be willing to repay it a proportion of the amount of the pay-roll of these employees, although switchmen were specifically mentioned in the sixth clause of Section 2 aforesaid as those whose expenses are to be apportioned, after payment of the same by the Denver Company, upon a wheelage basis.

2. The prior declarations of the parties agreed with defendant's construction of the contract. Prior declarations.

It seems to us that the very clear and certain meaning of the contract itself is sustained also by testimony as to the actual conversations of the parties at the time of the negotiations. Mr. Smith says that there were conversations upon the subject of "switching crews and station agents both — station agents at Denver and Colorado Springs."

"We had conversations on these subjects at various times before and since the execution of the contract. * * * It was understood that the Denver and Rio Grande Railroad Company should employ all employees in the joint service except those employed in train service." Rec. p. 751, fols. 2108–9.

He also testifies that by arrangement between himself and Mr. Cable these employees were to be carried on the pay-rolls of the Denver Company. That this employment included engineers who operated switch engines in the yards. Rec. p. 751, fol. 2110.

3. Separate service is impracticable in the Denver yard.

Impracticable.

If further evidence were needed as to the intention of the parties in making the contract, it is furnished by the testimony of numerous witnesses

Switching crews.

that it is impracticable in a yard such as that of the defendant, at Denver, to successfully operate the yard with switching crews under the employment of different companies, who are devoted to the exclusive service of the companies employing them, respectively, and who could not be called upon for the general business of the yard, even if their movements are directed by a common yard master.

It is first important to notice the relations of these switching crews to the service. A switching crew consists of an engineer and fireman of the

Rec., p. 748, fol. 2111.

switch engine, a foreman and one or more helpers.

Rec., p. 687, fol. 1805.

There are in the Denver yard some fifteen switching crews, nine being used at once during the day, and the rest being used at night. The yardmaster cannot be present at the performance of work by each of the several crews in the yard, but he has to assign work to each crew, which is then transacted under the supervision of its foreman.

Rec., p. 688, fol. 1807.

The real persons, then, supervising the immediate

Rec., p. 748, fol. 2113.

work in which the switching crews are engaged, are the respective foremen of the several crews. But under the contention of the complainant, these foremen would be under different employment, with different interests, with different work, and one could not be called upon to do any work for which the other may be called.

The impracticability of successfully operating the Denver yard under these circumstances is shown by the evidence. Mr. Smith says it is im-

Rec., p. 750, fol. 2020.

practicable, "for the reason that the yard has not capacity enough to be divided into two parts, and to assign one part to one line and the other to the other, and, without assigning them separate parts

of the yard, there would be a conflict between the crews of the different roads." Impracticable.

In reference to the necessity of having all the engines and crews available for any and all of the joint service, he says: Switching crews

"They could be used to better advantage in that way—that is, one engine and one crew would in many instances do the work to be done for both companies, that the separate engines would do the work for each. * * * The crews do their work on the same track. One crew would be likely to impede the work of the other, and thereby have the one crew remaining idle while the other was working, and in leaving their work they are switching, they would leave the cars of one company so as to work to the disadvantage of the other company. I mean by that that it would cause more labor. It would leave it in such a shape as to cause them more labor than if it had been done by one crew, acting under one order or direction." Rec. p. 730.

In reference to the encumbrance upon the tracks, caused by the presence of engines which could not be called upon for joint service, he says:

"They would be in the way of other engines. Other engines would have to be called from distant parts of the yard to do the work that this engine standing idle there, belonging to another company, could do to advantage. * * * It would be necessary to remove the engine lying idle, and it would result in controversy between the crews." Rec. p. 730, fol. 2029. Rec. p. 731, fol. 2030.

Mr. Smith also testifies to the difficulty in practical experience of adjusting and handling yard business, even by the employees of one company.

Mr. Smith further testifies, upon cross-examination, upon this subject, as follows:

"I think that if the Rock Island engines were in there (Denver yard), manned with crews that were subject to the orders of the Rio Grande master, and if the Rock Island did the business of switching in that yard to the best advantage—I mean by that the advantage of both companies—that one engine would do it (Rock Island share of the business). But if the Rock Island engine, Rec. p. 856, fol. 2391.

Impracticable.

manned by Rock Island crews (crews of the Rock Island Company), are in that yard, with instructions to do only Rock Island business, that it would not be practicable to do it, and the interests of the Rock Island would not be served, or the interests of the Rio Grande either.

Switching crews

"Q. Don't you think the Rio Grande Company could bear it, if the Rock Island could? A. No, sir, for the reason that the Rock Island alone would suffer to the extent of one dollar and the Rio Grande would suffer to the extent of nine.

"Q. Don't both of these companies have an equal right to the use of that yard? A. Yes, sir, in the manner that I have described, but the Rock Island Company, I do not understand, would have the right to enter and blockade and hamper the business of the Rio Grande Company, which would be the only result of placing Rock Island engines in the yard for the transaction of Rock Island business."

Mr. Smith further states his experience in the joint use of railroad yards at State Line, near Kansas City, to which we respectfully direct the Court's attention.

Rec. p. 8[illegible]

Mr. Deuel, upon the subject of practicability, testifies as follows:

Rec. pp. 4-4[illegible]

"In my opinion, it is not practicable for the two companies to operate their own engines, doing only exclusive work, in one yard. The only way that could be done to advantage, if the yard was large enough, would be to assign certain tracks to different companies, and it probably would work, but, in the condition of the Rio Grande yard, no crew can work very successfully without they should do the joint business—that is, handle the cars as they came for either, but it would be impossible for either company to go in and do their own exclusive work. * * * Our yard is divided up into three classes. We have a system of wagon tracks, with a leader to it, and a drill track, on which the switching is done. All our wagon tracks go off of this leader. If the Rio Grande was occupying this leader, it would be impossible for the Rock Island to take out any of its cars by the wagon track, and *vice versa*. Another part of the yard is assigned for making up outgoing trains,

and only one engine could work on that at one time, and there would be confusion if they were both to try to reach this point at the same time. * * * I do not think anybody could handle two classes of employees in one yard. * * * because of the confusion and wrangling and liability of accidents and all that. * * * It would always be an excuse, in doing the work, if they did not do the work, the excuse would be that the Rock Island was using the track; and if the Rock Island crew could not do the work, the Rock Island people would make the excuse that the Rio Grande had the track. It would be a continual source of annoyance and confusion to the operating department to have the work of different companies—to have the employees of different companies trying to do the work in one yard. I do not think it is possible for the work to be done in one yard, if each company maintained its own crews. * * * A common yardmaster would not do away with the trouble unless the engines were instructed to do common work."

Impracticable

Switching crews.

On cross-examination, Mr. Deuel testifies as follows:

"It cannot be done, for the reason that if the yard was so constructed and large enough so that one part of it could be assigned exclusively to the Rock Island use in those yards, and leaders to them, whereby the engines, in switching in either of them would not conflict with one another, there would be no objection to it at all. But we have in our yard down here three leaders and three drill tracks. All of our wagon tracks go off from one of the leaders, and when one company is occupying that track, one is idle. That is where the confusion comes in. When the Rio Grande Company wants to make up a train on the tracks assigned for making up trains to go out, the Rock Island can not do anything until they get through, and *vice versa*. That is where the difficulty comes in. But when their engines can be assigned to do whatever work they are asked to do by the yardmaster—" (Witness here interrupted by counsel.) * * * "The annoyance and delays and confusion would, I think, put a man in an asylum in about fifteen days."

Rec. pp. 44, 7.

Impracticable.

In reference to the difficulty of preserving proper discipline and determining cases of fault, he says:

Switching crews.

Rec. p. 447.

"It would be very hard work to investigate any case, and say a man did not do it maliciously, or did do it maliciously. Any switchman can go to work and be about the track and work and work for half a day switching cars, and I defy anybody to stand on the side-track where he is doing it and say whether he is doing it for fun or whether it belongs to his work. He will say, 'I am getting along the best I can, and when I get through I will let the other men in.'"

Mr. Burns, Superintendent of Transportation for defendant, testifies as follows:

Rec. p. [illegible] fol. 1254

"It would lead to endless contention between employees of the two companies. It would be impracticable. It would lead to a blockade and stagnation of business, and involve endless expense in the way of damage to cars, claims for non-delivery of freight, etc. * * * We will illustrate: That there are two companies in the same building, or different buildings, and a customer comes from the city and they require a car switched immediately. There are certain tracks set aside for team tracks. They are kept for loaded cars that come in over the Rio Grande road. Then the party wishes a car that comes in over the Rock Island to be put on the team track. The Rock Island agent would issue instructions requesting the yardmaster to place the Rock Island cars on the team track, and the Rio Grande agent would issue instructions to keep the Rio Grande cars on this team track; consequently, there would be contention."

If the separate crews were under a common yardmaster, the witness still says:

Rec. p. [illegible] fol. 1256.

"The same confusion would exist, because there is only one line or one track leading into several tracks, and one engine of either company can occupy this track at one time, and consequently, if the Rock Island and Rio Grande attempted to occupy it, there would be a collision; * * * and I would consider that it would be very dangerous for switchmen and other employees to work on the road."

Impracticable.

Mr. Palmer, Superintendent of the Kansas Pacific, testifies substantially to the same effect. He says:

Switching crews.

"It would be turmoil, and quarrels, and interfering with each other; and in my opinion I do not think you can operate it very successfully or very beneficially." R. p. 627, fol. 1629.

This witness, when asked upon cross-examination if the difficulty would still exist if either company could demand the removal of an employee, says:

"Yes, I do, most emphatically. That is my experience." Rec. p. 632, fol. 1646.

Mr. Campbell testifies:

"I have never seen such a thing done, and I do not believe it is practicable * * * because it is liable to lead to trouble as between the employees, and interfere with the business of the road—that is, with the patrons, as well as the road itself; and I do not think it can be done practicably and economically." Rec. p. 668, fol. 1726.

He further testifies:

"There is a great deal of work to be done in handling cars from one track to another, in making up trains, taking out empties, and putting in loads to be unloaded, at the house tracks, or wagon tracks, or other works, at different points throughout the yards. It is very frequent that an engine and crew will take out a few cars out of one track and put them on to another, and so on, all through the yard." Rec. p. 669, fol. 1728.

When asked, if Rock Island engines handled only Rock Island cars, and Rio Grande engines handled only Rio Grande cars, whether that would interfere with the operation of the yard, he says:

"Most assuredly, yes, sir. * * * It certainly would; yes, sir. Unless the yard was divided and each road had a portion of it exclusively for its own business." Rec. p. 670, fols. 1728-9.

Mr. Choate, who was for a long time Superintendent of the Colorado Division of the Union Pacific system, says in reference to the practice contended for by complainant:

Impracticable.

Rec. p. 6[illegible] fol.

"It would be very much against modern practice, and very impracticable. * * * I do not think any good railroad man would ever agree to do such a thing."

Switching crews.

When asked whether, if the party had agreed upon such a plan, it would affect his opinion, he says:

Rec. p. 760

Rec. p. 760, fol. 1[illegible]

"No, sir. I would think he was a perfect fool to agree to it. * * * I say if that yard if all the tracks are joint tracks, and either company has the right to go on all of them, it is impracticable."

When asked as to the experience upon which his opinion is based, he says:

Rec. p. 760, fol. 1[illegible]

"It is based upon the experience of having served twelve years for railroad companies. I have never known a railroad company to have a joint switching yard a success. I have known companies, with whom I have been, to try the experiment."

Mr. Derby, Superintendent of the Missouri Pacific, testifies that it would not be practicable, and he says in his cross-examination that he has had experience in operations of that character at Omaha and Hiawatha, Kansas, and at Pueblo. That this experience showed that there was a great deal of trouble from that system of work. "A great deal of delay. Whoever got the tracks first held them until they got done."

Rec. p. 7[illegible]

In speaking of his own experience on the cross-examination, he says:

Rec. p. 768, fol. 1[illegible]

"The difficulty is, they all want to do work at the same time. If there is a string of cars that wants to be handled, and the Union Pacific takes an hour or two hours to get their work done, in the meantime the Missouri Pacific engine, if it is there, has to wait until they get through, then it handles the same track, and then the Santa Fe comes, and it takes three times instead of only once. * * * My idea is that the difficulty is that when two different companies have got to handle the tracks, to switch cars in and out, that it can be done with one engine and at the same time, instead of consuming about twice the time in switching; if you are crowded

for room you cannot get the work done at all, on account of the time it takes to switch in the yard." Impracticable.

We ask the attention of the Court, also, to the testimony of the following witnesses, all experienced railroad men, whose evidence was taken at Chicago: James W. Dalby, Superintendent of Terminal Facilities at Kansas City, Mo.; A. W. Dickinson, General Superintendent Missouri Pacific Railway, at St. Louis, Mo.; E. Dickinson, formerly General Manager for Union Pacific Railway, and afterwards Superintendent of the Baltimore and Ohio Railway at Chicago; George O. Clinton, Daniel Howard, and of other witnesses at Chicago. Rec. p. 1076-7. Rec. p. 1110. Rec. p. 1155. Rec. p. 1173. Rec. p. 1200.

We also call the attention of the Court to the fact that every company whose representatives were called to the witness stand has respectively its separate switching yards, and does not have any joint general switching yard in which two or more companies use all tracks in common, and yet with exclusive crews for exclusive work.

The practice of all companies at Chicago, Toledo, Kansas City and elsewhere is against the contention of complainant.

Testimony of a contrary character was produced by the complainant, but counsel are in error in stating that only nine witnesses supported the defendant's contention on this question. At least, twelve so testified, and of these, eight, to wit: Messrs. Smith, Deuel, Burns, Campbell, Palmer, Choate, Derby and E. Dickinson were well acquainted with the Denver Company's Denver yard, and knew its capabilities, and the fact that it was not divisible into separate parts for the separate use of different companies. U. Arg. p. 81.

On the other hand, the most of complainant's witnesses had no such specific knowledge, and

testified only on the general question, and, as already suggested, the actual practice of the companies represented by these witnesses was entirely different from that contended for by the complainant.

General Manager's letter.

4. The defendant is not estopped by any past construction given to the contract, especially as to the Denver yard.

As to the use of separate switching crews, the complainant relies on a letter written by General Manager Smith to President Cable, dated February 16, 1880.

Rec. pp. 572 ff.

This letter was written in the early days of the relations of these companies, and its special point was the necessity of avoiding any divided authority in the movement of engines and trains.

As a construction of the contract on the subject under discussion, we submit that it is not controlling.

This contract was made by the Boards of Directors and ratified by the stockholders of the contracting parties, and if the contract taken by itself requires the construction we have contended for, then no dictum of a single officer, for the time being in authority, can change it. Defendant's General Manager had doubtless authority to administer and carry into execution the terms of the contract, but had no authority to change, or in any way modify, the rights of the two companies under it.

The provisions of the contract were known to both parties, and constituted the law of the relations between the companies, controlling the action of the executive officers; and if complainant relies on this letter as fixing the rights of the parties, it is incumbent on it to prove the authority of the writer

Dixon Co. v. Field, 111 U. S., 83-94.

of the letter to determine these rights. It, of course, cannot and has not attempted to do this, and by the answer to the letter itself it is apparent that such authority is not conceded. General Manager's letter. Rec. p. 874.

But if the principle of estoppel is here applicable at all, how far does it extend? Certainly, only to the extent that the complainant has been permitted to act and has acted upon this construction of the contract. While the complainant has used its separate switching crews to some extent at Colorado Springs, where the circumstances were entirely different, yet when a demand was made for separate switching crews in the Denver Terminal yards, it was denied by the defendant, and a right under the contract disputed. As to this yard, therefore, involving, as it does, the real matter of difference, the contract itself must determine the rights of the parties.

5. *Traffic must be handled at Denver Terminals by joint employees.* Office and yard employees.

The employment of separate forces devoted to the sole and exclusive service of the companies separately in and about the offices and yards is affected by the same considerations as the employment of separate switching crews. So long as these parties are obliged to use one common terminal yard, incapable of separation into parts, and must, over side and spur tracks used in common, have access to the same warehouses, stone-yards, coal-yards and other industries; so long as they must use the same freight-house in common, the same office, the same loading and unloading platforms, the same house-tracks, wagon-tracks, etc., just so long are the employees, used for the handling and disposition of traffic, "necessarily employed in the performance of duties incident to the joint use and Rec. p. 15.

Office and yard employees.

occupation of said railway." (Article II., Section 2, clause 6.) Such employees under the contract are to be employed and paid by the Denver Company, which is to be repaid a proportional part, according to pay rolls, on the basis of wheelage, by the Chicago Company or its successor.

The condition, extent and character of the Denver terminal yard, the location and character of freight-house, platforms, wagon-tracks and house-tracks were such at the time of making this contract and still are such that no separate forces of employees could have been contemplated, and no such arrangement is now practicable.

We respectfully submit that paragraph No. 3 in the final decree should be modified accordingly.

V.

THE DENVER COMPANY IS NOT BOUND BY THE CONTRACT TO FURNISH FACILITIES FOR CLEANING COMPLAINANT'S CARS.

In the discussion of the last preceding topic, counsel for complainant also refer to the subject of car cleaning and the correspondence of April, 1890, relating thereto.

Pl. Ans. pp. 77-79.

1. The subject of car cleaning was entirely outside of the contract. While the contract provides that the Denver Company shall care for locomotives of the Chicago Company "upon reasonable terms which shall be agreed to by the General Managers, or other authorized officers of the two companies" (Article I., Section 3), yet it is absolutely silent on the subject of cars. The Denver Company did, however, as a matter outside of the contract, attend to the cleaning of complainant's cars, doing this work at its shops, with certain of its shopmen—a fact which is recognized by the telegram of Mr. St. John. And when Mr. St. John sent

Service.

Rec. p. 61.

Rec. p. 670.

Rec. p. 76, Exhibit B.

this telegram, asking if defendant denied the *right* of complainant to clean its own cars with its own men, Mr. Smith very properly admitted that right, because it was not covered by the contract, and, in the absence of contract restrictions, the complainant could do what it would with its own. Mr. Smith adds, however, a clause which complainant's argument omits, to wit: Service.

11 Arg. p. 77.

"But you have no right to use our buildings, shops or implements for that purpose without our consent under definite arrangements. If you desire, we will assign men for your work upon reasonable terms to be agreed to by us."

Rec. p. 877, Exhibit 14.

The gist of this correspondence was not as to the place of cleaning, or as to the use of particular tracks, but as to the method and means of doing a service not covered by the contract.

As to track facilities for accomplishing it, however, the rights of the Chicago Company were protected by the contract under the provision that if the Chicago Company desired "any facility or convenience" not then existing, it could call upon the Denver Company to furnish it, and if not furnished within a reasonable time, the Chicago Company could construct or acquire the same for its exclusive use (Article III., Section 11).

Rec. p. 67.

So far as this correspondence relates to the use of separate employees for cleaning cars, it is not germane to this controversy, because it relates to a matter outside of the contract. So far as it relates to the use of the coach track at Burnham, it has already been discussed.

2. Even if it were true that the complainant had demanded a separate track for this purpose, and the demand had been refused—which, however, is not the case—yet the contract itself provides the

Track facilities.

Track facilities.

only remedy, which is the construction by the complainant of its own facilities for this purpose.

Rec., p. 17.

It is because of this provision of the contract that we think the Court erred in paragraph five of the final decree.

The Court there decreed that if no existing track could be conveniently set apart for the cleaning of complainant's cars, then "the defendant *shall construct and equip* a track therefor at the joint expense of the parties, complainant and defendant." Is not this the making of a new and different contract between the parties? If so, it is of course beyond the power of the Court. This part of the decree contemplates the creation of a "facility or convenience which does not now exist." But this is a subject explicitly provided for in a different manner in the contract, which reads as follows:

Decree.

Rec., pp. 17-18.

"If the Chicago Company shall at any time during the term of this indenture * * * desire any facilities or conveniences which do not now exist, it shall give to said Denver Company notice of such desire, and the said Denver Company *may*, within thirty (30) days after receiving said notice, proceed to construct such tracks, or acquire such facilities and conveniences; and the Chicago Company will pay for the use of the same in monthly installments, as provided in Article II., Section 2, hereof, a sum equal to a one-twelfth part of two and one-half per centum per annum from the date of such construction or acquisition upon the cost of construction or acquiring such tracks, facilities and conveniences, and shall pay in addition its share of the cost of maintenance thereof, based on wheelage as herein provided. *If* the Denver Company shall *neglect or refuse* to construct such tracks, or acquire such facilities and conveniences within a reasonable time, the Chicago Company, *at its own expense*, in its own name, or in the name of some third person or corporation, as it may be advised, *may construct or acquire* the same, and *it shall be the sole owner*, and have the right to use and remove the same or any part thereof during the term of this indenture," etc. (Article III., Section 11).

This subject, when understood, seems to be so clearly and definitely covered by the contract, that a mere statement of the situation serves all the purpose of an extended argument.

We ask a modification of the fifth paragraph of the final decree so as to make it conform with the contract.

VI.

THE COMPLAINANT IS NOT ENTITLED TO ANY RELIEF UNDER ITS ALLEGATIONS REGARDING THE FAILURE OF AGENTS AT WAY STATIONS TO SELL ROCK ISLAND TICKETS.

Counsel for complainant amplify the topic here suggested, to the following: "As to the right to demand absolutely the removal of any employee engaged in the joint operation of the line." (Plaintiff's Argument, page 83.) P. Arg. p. 83

No such general topic is in issue in this case. The only cognate subject is an allegation in the supplemental bill that certain agents had refused to sell Rock Island tickets at certain way stations, and that a demand for removal of these agents, based on this cause, had been disregarded by the defendant. Rec. p. [illegible]

This is another case where the candor of the complainant is not such as to win admiration. It transpired in the submission of evidence that in this matter these agents in small towns had but complied with the rules of the complainant company, and that the officers of the company and not these agents were responsible for the situation. So palpable had this fact become that at the time of the oral argument in the Court below, when this subject was reached by counsel for the defendant, the counsel for complainant suggested in open Court that this point would not be insisted upon. Complainants' waiver.

Complainants' Waiver

and the Court thereupon directed the defendant's counsel to pass it by, saying that the Court would certainly not consider a point which the complainant itself abandoned. It was because of this abandonment of the claim in open Court that no mention is made of the subject in the final decree.

As these matters, however, by their very nature, do not appear of record, we shall briefly discuss the question as it is presented by the pleadings and the evidence. We invite the attention of the Court to the statement of this matter contained in defendant's answer to the supplemental bill.

Rec. p. 144.

Contract rights.

The defendant admits, and has always admitted, that the Chicago Company, under the contract, had the right to do a through business between way-stations on the Denver line and stations on the Chicago Company's line east of Colorado Springs.

Rec. p. 158.

In accordance with the contract in the very early history of the relations of the contracting companies, circulars were issued by the passenger department of the defendant company recognizing this right. (See Deuel's Exhibits 1 and 21. The instructions contained in these circulars have never been revoked.

The Chicago Company or its lawful successor has at all times had the undoubted right, by proper regulation and direction upon time-tables, to have its trains flagged at these way-stations for the accommodation of passengers going to points east of Colorado Springs. It is, however, a necessary regulation of railroad operation that passenger trains shall not be flagged for passengers at way-stations, except where the regular employees' time-tables so authorize. This custom and necessity is recognized and acted upon in the time-tables of both

the complainant and the defendant introduced in evidence.

Companies' rules.

From the beginning of the joint relations, the Chicago Company or the complainant has furnished to the defendant such information as it desired to have inserted in the time-tables issued by the defendant company. Up to the time of the bringing of this suit, it had not indicated any flag-stations whatsoever, but had constant knowledge of the rules of the defendant company and of its custom in the marking of signals upon its time-cards, and operated its trains in accordance with the rules and time-tables of the defendant company. These rules provide that a flag-mark should be put at stations where trains could be flagged for passengers, and a stop-mark at places where trains would regularly stop. The complainant company has at times requested a modification of defendant's time-tables by putting in stop-marks where they did not exist before; as, for example, at the Eighth Street depot in Pueblo. But with full knowledge as to the method in which the time-cards of the defendant company were prepared, and of the signs and signals fixed by its rules, the complainant never requested that trains should be marked for flagging at Castle Rock, Monument, Larkspur, or at any other way-station.

The complainant's own rules required that its agents (which would necessarily include the agents on the Denver line engaged in joint service) should follow the rules of the defendant company; and especially provided that they should not sell tickets to points at which trains did not stop, thereby calling special attention to the provision of the time-tables here referred to.

In the supplemental bill, however, the sole ground of complainant's demand on this subject is

Allegations of facts.

that agents declined to sell tickets at these stations, where the time-card did not permit Rock Island trains to be flagged; and upon that refusal to sell the complainant bases a demand for the immediate removal of such agents.

This seems to be in accordance with a scheme worked up by the complainant company, as we find the same man at three different stations on about the same day making this request for purchase of tickets, and whose name and the circumstances of purchase are reported by the Assistant General Manager of the complainant company.

Rec., p. 884.
Rec., p. 1014.
Defendant's Exhibits X and Z
Rec., p. 963.

To discover the unwarranted character of this demand and the impropriety of the allegations of the complainant in this behalf, we respectfully ask the attention of the Court to the rule of the defendant company, the time-card of the defendant company, as illustrated in Burns' Exhibit 2, and the time-cards numbered five and six, of 1890, of the complainant company, including Rule 69, therein printed, which reads as follows: "Station Agents will use all exertion to ticket passengers, *but in no case sell tickets to a station at which the train does not stop.*"

Evidence.

Since the filing of the supplemental bill and the answer thereto, the complainant has requested the insertion of flag-marks at all stations for its trains, as shown in correspondence attached to Burns' affidavit, and this request has been promptly complied with.

Rec., p. 953 f.

The circumstances relating to the entire transaction are shown in Mr. Smith's evidence (Pr. Rec., pp. 805–807), Mr. Deuel's evidence (pp. 449–453), Mr. Burns' evidence and affidavit (Pr. Rec., pp. 534–6, 953–5).

We respectfully suggest that there is no action in this matter on the part of the defendant com-

pany or any of its employees which would justify complaint on the part of the complainant, or any relief to it at the hands of the Court, even if the point had not been expressly waived in the Court below.

CONCLUSION.

Conclusion.

The questions involved in these appeals require, for their full comprehension, the presentation of so many matters of detail that it is difficult to condense the argument into any small compass, and the discussion of some of the topics requires such frequent reference to maps that an oral argument would be more satisfactory, but so important is it that these differences be speedily settled that the parties have agreed upon a submission under Rule 20.

The parties to the contract are bound together in such a manner as to involve daily, and even hourly, relations and business transactions between them. These relations are to continue perpetually, and the proper construction of the instrument which settles their relative rights is of vital interest to all concerned.

It is apparent, however, that of the various subjects discussed in the preceding pages all are not of equal importance.

There are two matters of difference which so far exceed the others, not only in their immediate effect, but in their far-reaching results in the future, that we again, in conclusion, revert to them. These are the use of the Denver terminals for business which does not pass over the Denver Company's line, and the extent of the exception under the term "shops at Burnham."

The decree of the Court below, after an oral argument lasting a week, was in favor of The

Conclusion.

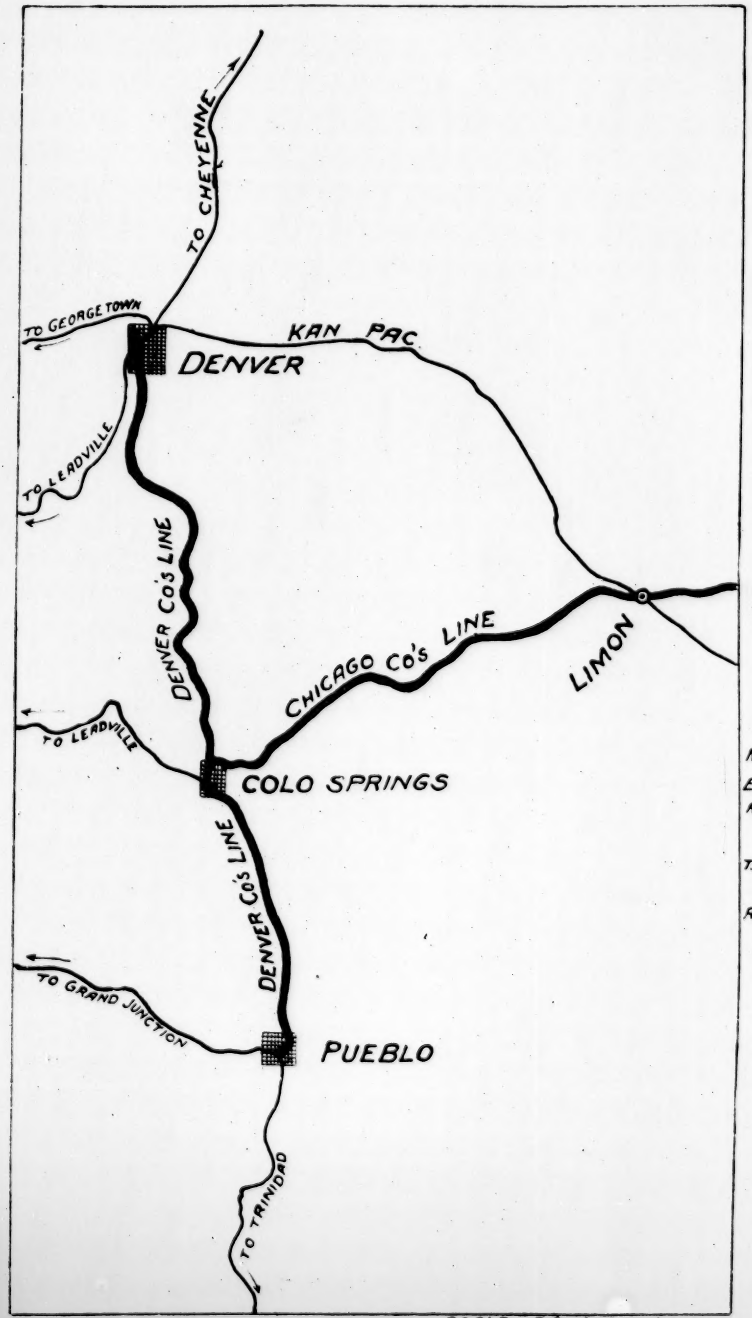
Denver and Rio Grande Railroad Company on both of these matters. We are convinced that a careful analysis of this contract, and especially when the relative situation of the parties and of the properties involved is considered, must lead this Court to the same conclusion; and on these matters we confidently ask an affirmance of the decree.

EDWARD O. WOLCOTT,
JOEL F. VAILE,
For The Denver and Rio Grande Railroad Company.

APPENDIX.

		PAGE.
1.	Exhibit A—Map of Railway Lines	125
2.	Exhibit B—Denver Yard	127
3.	Exhibit C—Burnham Shops	129
4.	Exhibit D—Title, Shop Map	131
5.	Exhibit E—Title, Yard Map	133
4.	Contract of February 15, 1888	135
6.	Kansas Law Affecting Railroad Charters	157
7.	Colorado Law—Consolidation of Corporations	157
8.	Colorado Law—Leasing of Railroads	161

EXHIBIT A



FROM
MIDDLE
EXHIBIT
REC P 2
AND
T. F. W. & J
No 3
REC P

EXHIBIT B

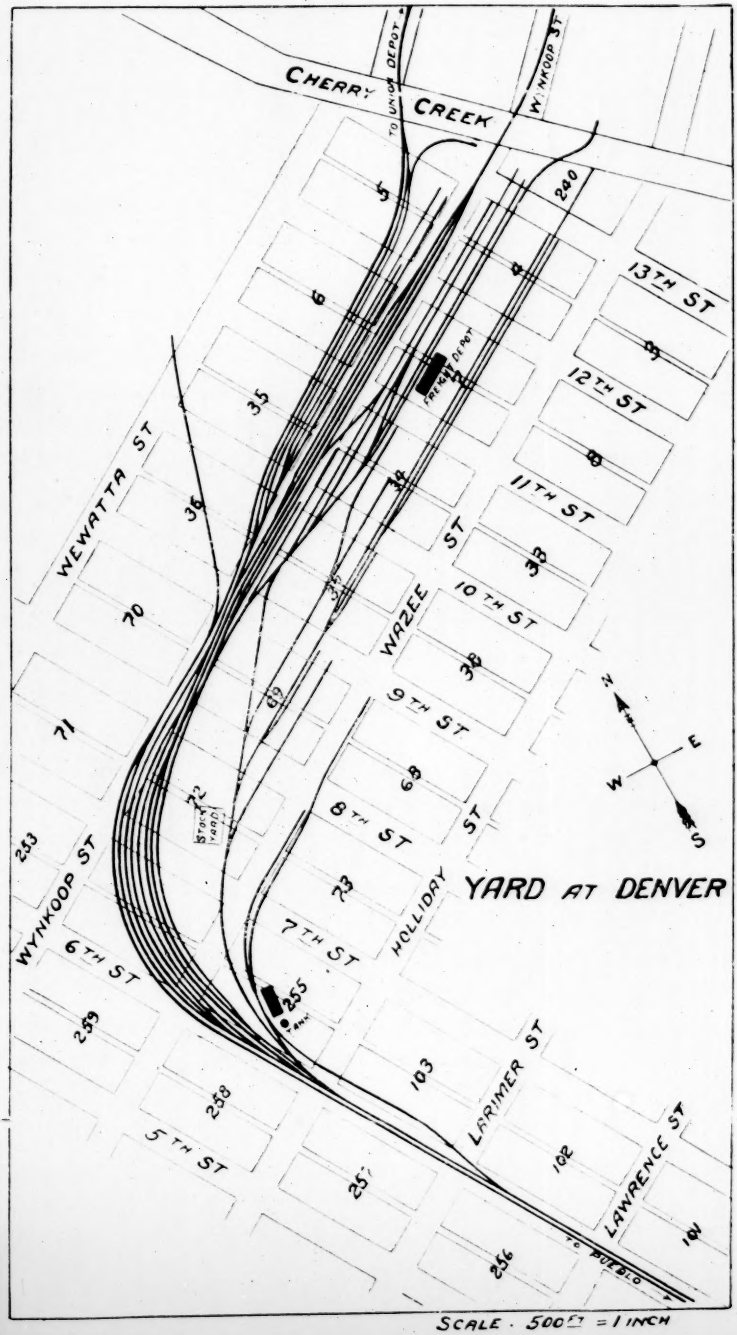
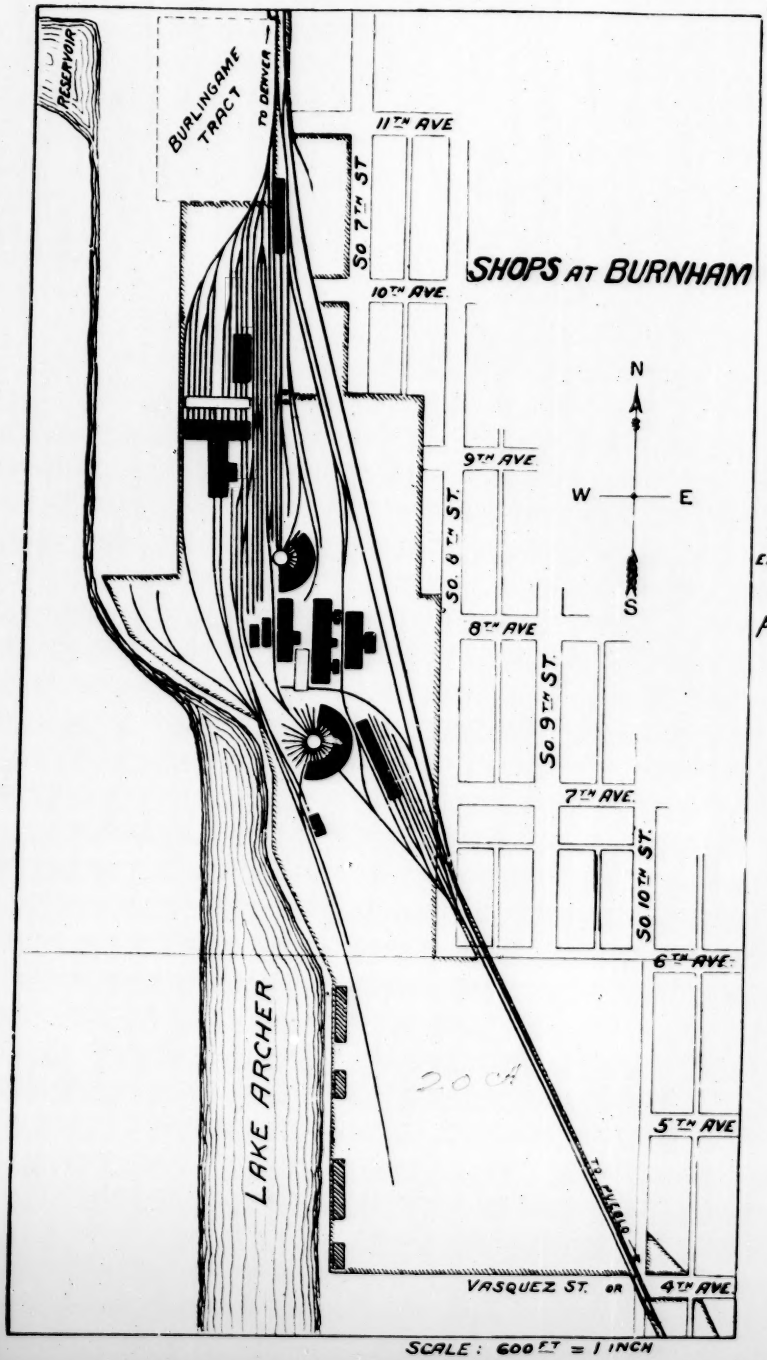

CHERRY CREEK
TO UNION DEPOT
N. WYNKOOP ST
13TH ST
12TH ST
11TH ST
10TH ST
9TH ST
8TH ST
7TH ST
6TH ST
5TH ST
WEWATTA ST
WAZEE ST
HOLLIDAY ST
WYNKOOP ST
LARIMER ST
LAWRENCE ST
TO PUEBLO
FREIGHT DEPOT
STOCK YARDS
YARD AT DENVER
N
E
W
S
SCALE · 500 FT = 1 INCH

EXHIBIT C



FROM SMITH EXHIBIT N. REC. pp. 735.

EXHIBIT "D."

A NEW MAP OF THE
DENVER & RIO GRANDE RAILWAY SHOPS
AT
BURNHAM
NEAR DENVER, COLO.
SHOWING ALL TRACKS BUILDINGS AND OTHER IMPROVEMENTS
Compiled from special surveys under the direction of
Chief Engineer J A McMurtrie, by M H Rogers Asst Engr
SURVEY BEGAN FEB 1ST FINISHED FEB 29TH
1884
L C WOODMAN Del.

EXHIBIT "E."

MAP

OF THE

DENVER & RIO GRANDE R'Y. CO'S

YARD

AT

DENVER. COLO.

SHOWING

ALL TRACKS, CONNECTIONS, GROUNDS & BUILDINGS.

SURVEYED DECEMBER 1883 – REVISED FEB'Y 1886 BY M.H ROGERS

SCALE 60 FT = 1 INCH.

Office of Principal Engineer D. & R.G. R'y.
February 1886
F.P. KING
PRIN'L ENG'R

CONTRACT OF FEB. 15, 1888.

ARTICLES OF AGREEMENT made and entered Rec. p. 12.
into this fifteenth (15) day of February, in the year eighteen hundred and eighty-eight, by and between The Denver and Rio Grande Railroad Company, a corporation organized and existing under the laws of the State of Colorado, hereinafter referred to as the "Denver Company," and The Chicago, Rock Island and Colorado Railway Company, a corporation organized and existing under the laws of the same State, hereinafter referred to as the "Chicago Company."

WITNESSETH:

First—The Denver Company owns and operates a railway with appurtenant property, a portion of the main line of which extends from Denver through Colorado Springs to South Pueblo, all in the State of Colorado; and the Chicago Company owns a railway which is being constructed from the western boundary of the State of Kansas, at which point it will connect with the Chicago, Kansas and Nebraska Railway, to the city of Colorado Springs, above mentioned.

Second—The interests of both parties and of the public will be promoted by the establishment and operation of a through line of railway between all the points on the line of the railway of the Denver Company between and including Denver and South Pueblo, and all points on the line of railway which will be operated by the Chicago Company and on the system of railways of which the Chicago Company will form a part.

CONTRACT. THEREFORE, in consideration of the premises and of the several covenants, promises and agreements hereinafter set out, the parties do covenant, promise and agree to and with each other as follows:

ARTICLE 1.

The Denver Company covenants, promises and agrees to and with the Chicago Company:

SECTION 1. It hereby lets the Chicago Company into the full, equal, joint and perpetual possession and use of all its tracks, buildings, stations, sidings and switches on and along its line of railway between and including Denver and South Pueblo, excluding its shops at Burnham, meaning and intending hereby to include in the description aforesaid all and every portion of its railway and appurtenant property between and at the points aforesaid, and all improvements and betterments thereof and additions thereto, which may be jointly used by the parties, as hereinafter provided.

SEC. 2. It will maintain and keep in good repair the property described in the preceding section during the term of this contract, and will comply with all regulations prescribed by law for the safety of the public.

SEC. 3. It will, if required by the Chicago Company, provide the necessary housing and care of the locomotives which said party may have from time to time at Denver and South Pueblo, upon reasonable terms, which shall be agreed to by the General Managers or other authorized officers of the two companies. It will, upon like requisition, furnish, in the same manner it provides its own locomotives on its tracks above described, all water and coal which the Chicago Company will need for the operation of its trains over the railway of the Denver Company. The compensation which shall be

REC. P. 11.

paid for the water supply shall be ascertained on the basis of wheelage as hereinafter provided for expenses of maintenance and repairs; and the compensation for coal so furnished shall be the actual cost thereof in the chutes and platforms from which it is transferred to the locomotives of the Chicago Company. If any disagreement shall arise as to the performance of the agreements in this section expressed, or as to the compensation which shall be paid for the same, it shall be determined by referees, as provided in Article III., Section 10, hereof. CONTRACT.

SEC. 4. It will pay all taxes and assessments which shall be levied or assessed directly or indirectly upon or against the property described in Article I., Section 1, hereof, or upon either the gross or net earnings thereof during the term of this indenture.

SEC. 5. It will at the commencement of said term, if so required by the Chicago Company, provide, and, during the continuance thereof, maintain at Denver and South Pueblo, for the exclusive use and control of said Chicago Company, engine houses conveniently located and having the necessary fixtures and sufficient capacity to properly and safely shelter all locomotive engines which said company may have occasion to use on the railway of the Denver Company.

SEC. 6. It is legally incorporated and has power to construct and maintain said railway, and to enter into and perform on its part the several covenants, promises and agreements in these articles contained. It will take such steps as shall be necessary, from time to time, to renew its corporate existence, and it will do no act which will operate as or in any manner work a forfeiture of its corporate existence, franchises, or the property described in the first section of this Article. If it shall, by lease,

CONTRACT.

sale or consolidation, assign or in any manner transfer its property or franchises, its lessee, grantee or assignee, as the case may be, shall, by the acceptance of such lease, grant, transfer or assignment, become bound on its part to do and perform such acts as are required by the terms hereof to be done and performed by the Denver Company, including all acts which may be necessary to preserve in full force the several obligations, promises and agreements herein contained, in perpetuity.

ARTICLE II.

Rec. p. 14.

The Chicago Company covenants, promises and agrees with the Denver Company as follows:

SECTION 1. It hereby accepts the covenants, promises and agreements made and entered into by the Denver Company.

SEC. 2. It will, from and after the completion of its railway from the boundary line of the State of Kansas to a connection with the railway of the Denver Company at or near Colorado Springs, while this agreement remains in force, pay monthly for the use of the premises described in Article I., Section 1, hereof, the sum of the following amounts:

First—An amount equal to a one-twelfth part of two and one-half per centum of the value of the property described in Article I., Section 1, hereof, and which value it is agreed is $3,000,000; *provided*, that the Denver Company will fence its track from Denver to South Pueblo; will rebuild bridge No. 94 A, near Butte Station, with iron and steel superstructure; will add a third rail to all side-tracks and spur-tracks on its line between Denver and South Pueblo, inclusive, which are not now provided with a third rail; will complete the relaying of its main track from Denver to South Pueblo,

inclusive, with fifty-two (52) pound steel rail; will CONTRACT.
lay an additional track, with third rail, from Pueblo to the station on the line of said Denver Company about six (6) miles north of Pueblo; and will complete the structures along its line now in process of construction; none of which improvements and betterments named in this proviso shall be added to the principal sum upon which said Chicago Company is to pay monthly an amount equal to a one-twelfth part of two and one-half per centum; but all other permanent betterments and improvements which shall be made to said property by the Denver Company in pursuance of the terms of this contract, after the Chicago Company notifies the Denver Company of its acceptance thereof, shall be added to said principal sum, and payment shall be made thereon by the Chicago Company as herein provided.

Second—An amount equal to a one-twelfth part of two and one-half per centum per annum upon all sums which the Denver Company shall, from time to time, pay for the construction or acquisition of additional tracks, facilities and conveniences, under Section 1, Article III., hereof, except round-houses at Denver and Pueblo.

Third—An amount equal to a one-twelfth part of five per centum upon the cost of constructing, and, in addition thereto, the cost of repairing round-houses which the Denver Company may erect and maintain at Denver and South Pueblo, for the exclusive use of the Chicago Company, as provided in Section 5, Article I., hereof.

Fourth—An amount equal to the proportion of the cost or expenses actually incurred and paid dur- Rec. p. 15.
ing the month for keeping the railway and appurtenant property described in the first section of Article I., hereof, in repair, and supplying it (the

CONTRACT. Chicago Company) with water, as the number of wheels per mile run by it, the Chicago Company, over said railway or any part thereof bears to the whole number of wheels per mile run over the same during the same period.

Fifth—An amount equal to the actual cost of the coal delivered during the month to the engines of the Chicago Company, under this contract.

Sixth—An amount equal to a proportional share of the expenses actually incurred in paying proper salaries to the General Superintendent and subordinate employees, including switchmen, telegraph operators, train dispatchers, and others necessarily employed in the performance of the duties incident to the joint use and occupation of said railway, not including trainmen, which proportion shall be ascertained in the manner provided in paragraph number four, above set out.

Seventh—An amount equal to one-half of all taxes and assessments lawfully levied and actually paid during the month upon the property described in Article I., Section 1, hereof; that is, that portion of the railway and appurtenant property used by the Chicago Company under this contract, excluding shops at Burnham, and equipments, facilities and conveniences not intended for joint use by the parties hereto. If taxes shall be assessed upon earnings made upon said railroad, the Chicago Company shall pay its proportional share, which shall be as its earnings shall be to the sum of all earnings made in the same period upon the railway used under this contract by the Chicago Company.

Eighth—If the Denver Company lets, leases or demises to any other railway company any right or privilege, or grants to any company permission to operate trains over any portion of its line described in Section 1, Article I., hereof, one-half of

all rentals reserved or compensation received, shall CONTRACT.
be applied by the said Denver Company in payment of the compensation which shall accrue and become due to the said Denver Company from said Chicago Company under these articles, but any sums received for maintenance shall be applied by the parties hereto on a wheelage basis. If the Denver Company shall use any tracks, facilities or conveniences constructed or acquired by the Chicago Company, as provided in Section 1, Article III., hereof, it shall thereafter also apply upon the compensation accruing from the Chicago Company for each month a sum equal to a one-twelfth part of two and one-half per centum per annum upon the cost of constructing or acquiring the tracks, facilities and conveniences so used. The expenses incurred in operating and maintaining such tracks, facilities and conveniences shall be adjusted on a wheelage basis, as provided herein.

Ninth—Said compensation to be paid for the use and occupation of the premises described in Rec. p. 16.
Section 1, Article I., hereof, by the Chicago Company, shall be paid in monthly installments, on the 15th day of the month following that for which it accrues, upon the presentation of a statement by the Denver Company to the Chicago Company, showing the amount due, accompanied, when required by the Chicago Company, by copies of the pay-rolls and vouchers showing the payments for expenses mentioned in the foregoing paragraphs four (4), five (5) and six (6), certified to be correct and true by the General Manager or other proper officer of the Denver Company.

Tenth—No compensation will accrue or be paid to the Denver Company from or by the Chicago Company for the use and occupation of said premises before the railway of the Chicago Company shall

CONTRACT. be completed from its initial point on the western boundary of the State of Kansas to a connection with the railway of the Denver Company within the time hereinafter specified.

Eleventh—The cost of operating and maintaining all tracks, structures and facilities used jointly by the Denver Company and the Chicago Company shall be apportioned between said companies on a wheelage basis. If any of such property is operated or maintained by the Chicago Company, it shall receive from the Denver Company a portion of the expenses incurred in so operating and maintaining such property, which shall be as the wheelage of the Denver Company on the railway between Denver and Pueblo is to the entire wheelage on said railway between the points last aforesaid. Said Denver Company shall receive from the Chicago Company such a portion of the expenses incurred by the Denver Company in operating and maintaining the railway between Denver and Pueblo operated and maintained by the Denver Company, which shall be as the entire wheelage of the Chicago Company is to the entire wheelage on said railway between Denver and Pueblo.

SEC. 3. It is legally incorporated and has power to construct, maintain and operate a railway which will extend from the western boundary of the State of Kansas to Colorado Springs, in the State of Colorado, and to make and perform on its part the several covenants, promises and agreements in these articles contained; that it will take such steps as shall be necessary, from time to time, while it remains a party to this contract, to secure renewals and extensions of its corporate existence, and it will do no act which will so operate as to in any manner work a forfeiture of its corporate existence or franchises. If it shall, by lease, sale or consolidation, assign or

in any manner transfer its property and franchises, its lessee, grantee, assignee or successor shall by the acceptance of such lease, grant, assignment or transfer become bound on its part to do and perform such acts as are required by the terms hereof to be done and performed by the Chicago Company, including such acts as shall be necessary to preserve in full force the several covenants, promises and agreements herein contained. CONTRACT.

ARTICLE III. Rec. p. 17.

The parties covenant, promise and agree to and with each other as follows:

SECTION 1. If the Chicago Company shall at any time during the continuance of the term of this indenture deem any additional side-tracks or double tracks between said Denver and South Pueblo, or along any portion of the line of railway between said points, essential or necessary, it shall call upon the Denver Company to construct the same upon reasonable notice. If the Denver Company shall not agree as to the necessity for the same, or shall refuse to construct said tracks, the question may be referred to referees as is hereinafter provided, and their decision shall be final and shall be carried out by the Denver Company without delay.

The Chicago Company shall pay monthly, as compensation for the use of the same, one-twelfth of two and one-half per centum per annum of the cost of such construction as is provided in Article II., Section 2, hereof, and its share of maintenance thereof based on wheelage, as provided in said section.

If additions are made by the Denver Company to its terminal facilities at Denver or South Pueblo, by the building of additional tracks, the Chicago Company shall have the right and privilege to

CONTRACT. occupy and enjoy equal use of the same, if it shall so elect; and if it shall so elect, then it shall, from the time of such election, pay monthly to the Denver Company, as compensation for such use, one-twelfth of two and one-half per centum upon the cost thereof plus interest at two and one-half per centum per annum upon such cost from the time of construction until the date of such election, in the manner provided in Article II., Section 2, hereof, and its share of maintenance thereof, after such election, based on wheelage, as is provided in said Article.

If the Chicago Company shall, at any time during the continuance of the term of this indenture, desire any side, spur or other tracks, other than those above specified, connecting any track described in Article I., Section 1, hereof, with its own tracks or with the tracks of any other railway company, or to any industry, or shall desire any facilities or conveniences which do not now exist, it shall give to said Denver Company notice of such desire, and the said Denver Company may, within thirty days after receiving such notice, proceed to construct such tracks or acquire such facilities and conveniences; and the Chicago Company will pay for the use of the same, in monthly installments, as provided in Article II., Section 2, hereof, a sum equal to a one twelfth part of two and one-half per centum per annum from the date of such construction or acquisition, upon the cost of constructing or acquiring such tracks, facilities and conveniences, and shall pay in addition thereto its share of the cost of the maintenance thereof, based on wheelage, as herein provided. If the Denver Company shall neglect or refuse to construct such tracks or acquire such facilities and conveniences within a reasonable time, the Chicago Company, at its own expense, in

Rec. p. 18.

its own name, or in the name of some third person or corporation, as it may be advised, may construct or acquire the same, and it shall be the sole owner, and have the right to use and remove the same, or any part thereof, during the term of this indenture: provided, however, that if the Denver Company shall desire to use any of such tracks, facilities or conveniences, it shall have the right to do so, but shall allow to the Chicago Company monthly for such use a sum equal to one-twelfth part of two and one-half per centum per annum upon the cost of such construction or acquisition, from the date of its joint use thereof, plus two and one-half per centum per annum on the cost thereof, from the date of the acquisition or construction of the same, and, in addition thereto, a portion of the expenses which shall be incurred in maintaining the same from the date of its election to use the same, which shall be ascertained on a wheelage basis, as herein provided, and the same shall be applied as provided in Article II. hereof; and provided further, that the Denver Company shall have the right, at any time before such tracks, facilities and conveniences are removed by the Chicago Company, to purchase the same from the Chicago Company, by paying to said company the cost of construction or acquisition of the same, with five per centum per annum thereon from the date of such construction or acquisition, provided it shall not already have paid for the joint use thereof, as hereinbefore provided. CONTRACT.

SEC. 2. Schedules of rules and regulations for the movement of engines and trains over the railway described in Article I., Section 1, hereof, shall be made from time to time by officers duly authorized by the parties. Such schedules shall, as nearly as may be practicable, accord equality of right, privilege and advantage to trains of the same class

CONTRACT. operated by both parties, and to trains of a superior class operated by either party, and a preference over trains of an inferior class operated by the other. All schedules of rules and regulations shall be reasonable and just to both parties, and shall secure to neither any unfair preference or discrimination against the other. They shall be executed and all trains shall be moved under the immediate direction of the Superintendent, or other officer duly authorized, of the Denver Company. If the parties cannot agree upon the adoption of any schedule, rule or regulation, or as to the modification or execution of any one existing, either party may demand a decision of such disagreement by referees, in manner and form as hereinafter provided. The referees are hereby invested with power to prescribe schedules, rules and regulations, and to modify existing ones; to make orders directing the execution of existing ones, and in case of willful disregard by either party of the rights of the other, to award damages to the party injured for the injury sustained because of such willful act.

Rec., p. 12. SEC. 3. Any employee of one company engaged in the operation of any part of the railway jointly occupied and used under this contract shall be removed from that portion of said line upon the request of the other.

SEC. 4. The Chicago Company will do no business as a carrier of persons or property between intermediate stations between Denver and Colorado Springs, or between intermediate stations between Colorado Springs and Pueblo, or between any such intermediate station and Denver, Colorado Springs or Pueblo; but it shall have the right to transport persons and property between stations on its railway and connecting lines, and all points between and including Denver and South Pueblo; provided,

however, that if the Chicago Company shall at any time acquire by purchase, construction or otherwise, a railway extending not less that fifty (50) miles from Pueblo, it shall have the right to transport persons and property between any point on such line and Denver. It will give reasonable notice to prevent the entry of passengers into trains at stations between the points above named, destined to other stations between said points, and if, despite such notice, passengers do enter its trains at such stations for transportation to other stations between Denver and South Pueblo, and are transported between such points, it will pay to the Denver Company the fare which shall be collected for such transportation, which shall be collected at the rates of the Denver Company; provided, however, that if the Chicago Company shall be adjudged a common carrier between Denver and Colorado Springs, or between intermediate points between Colorado Springs and Pueblo, it will be permitted, in the performance of the duties imposed by law on such carrier, to transport persons and property between such intermediate stations, and between any of such intermediate stations and Denver, Colorado Springs or Pueblo, but shall charge for such transportation the rates at the time charged by the Denver Company for like transportation, and shall account and pay to the Denver Company 65 per centum of all sums collected or received therefor. Said Chicago Company will not procure or cause to be procured any such judgment or decision, but will, so far as it reasonably and lawfully can, resist all efforts to have itself declared or adjudged to be a common carrier to or from such intermediate points, except as is provided in this contract. CONTRACT.

The Chicago Company will not permit any express company to do business on its trains to or

CONTRACT. from stations on the line of the Denver Company between South Pueblo and Colorado Springs, or between stations between Colorado Springs and Denver, or from Denver to South Pueblo or from South Pueblo to Denver. It may permit such a company or companies to carry property on its trains from Denver to Colorado Springs, from Pueblo to Colorado Springs, and to and from stations on its own railway and connecting lines to and from all points between and including Denver and South Pueblo.

REC. p. 20. The rates which shall be charged for the transportation of property by the Chicago Company between the stations on the line of the railway of the Denver Company shall not be lower than those charged at the same time for like transportation between the same points by the Denver Company; provided, however, that if the rates charged by the Denver Company shall be higher than those charged by competing lines for transportation between the same points, the Chicago Company will be allowed to charge rates as low as those of such competing lines.

In the division between the parties hereto of joint rates on through traffic, including all transported by each party which shall pass through Pueblo or Denver to or from the railway of the Chicago Company at Colorado Springs, no difference between the hauls made by the parties respectively on the railway of the Denver Company between Denver and Pueblo shall be considered. For example: If the Denver Company receives through traffic from points beyond Denver or South Pueblo and hauls the same to Colorado Springs, and there delivers it to the Chicago Company, it will receive no greater division of the through rate than it will receive for like traffic delivered at Denver and South Pueblo:

and if the Chicago Company hauls through traffic destined to points beyond Denver or South Pueblo to said points, instead of delivering it to the Denver Company at Colorado Springs, it will receive no larger division of the through rate because of such additional haul. CONTRACT.

SEC. 5. The repairs, renewals, additions and improvements made upon the railway described in Article I., Section 1, hereof, shall be made under the care and direction of the Denver Company; but no addition, improvement or betterment involving an expenditure exceeding $5,000, and no addition to terminals at Denver, South Pueblo or Colorado Springs, shall be made without the concurrence of both parties hereto, unless the Denver Company shall elect to make the same at its own expense; and any questions as to the advisability of such additions, renewals or betterments, or as to the proper cost thereof, may be referred as herein provided; but this clause shall not be so construed as to affect the right and duty of the Denver Company to keep said railway in good repair and condition, or to require the concurrence of the Chicago Company therein.

Additions, improvements and betterments which severally cost less than $5,000, and all others constructed with the approval of the Chicago Company, or by an award of referees, made as herein provided, shall be added to the property described in Article I., Section 1, hereof; and compensation for the use thereof shall be paid by the Chicago Company equal to two and one-half per centum upon the reasonable and proper cost thereof, which payment shall be made in manner and form as provided in Article II., Section 2, hereof. If any controversy shall arise between the parties as to the necessity for the construction of tracks or other extraordinary

Rec. p. 21.

CONTRACT.

betterments or permanent improvements, or as to the reasonable or proper cost thereof, it shall be determined by referees in manner and form provided in Section 13 of this Article.

SEC. 6. If the Denver Company shall neglect to comply with any police regulation, or permit any tracks, depot grounds, depots, water stations or other property included in that described in Article I., Section 1, hereof, to be and remain out of proper repair, after reasonable notice from the Chicago Company that such compliance or repair is necessary, the Chicago Company may, if such neglect or failure subjects it to danger, do such acts and make such expenditures as shall be necessary to such compliance, or the making of such repairs at the cost of the Denver Company.

If the Denver Company shall be subjected to any loss, damage, fine or penalty, as the owner of said railway between Denver and South Pueblo, because of the failure of the Chicago Company to comply, in the operation of said railroad, with some police regulation which affects such operation only, the Chicago Company shall indemnify said Denver Company for all such losses, damages, fines and penalties, with reasonable costs incurred in defending against the same.

SEC. 7. It shall be the duty of the Chicago Company to give prompt notice to the Denver Company of any defect, latent or otherwise, which may at any time come to the knowledge of the Chicago Company, and which in the opinion of the officers of the said last mentioned party may cause damage to its trains being operated upon the railway and appurtenant property described in Article I., Section 1, hereof; but in no event shall the Chicago Company be liable in damages to any one because of the failure to give such notice. If such defect

shall not be removed within a reasonable time after knowledge of its existence has in any manner been communicated to the Denver Company, said Denver Company shall be liable to the said Chicago Company for any injury which it shall sustain because thereof. CONTRA 1.

SEC. 8. Each party shall be liable to the other and to all third persons for all injuries and damages which shall be caused by the misconduct, carelessness or neglect of its own employees, and each shall save the other harmless and indemnified from all costs, expenses and damages which either shall be called upon to pay by reason of such misconduct, carelessness and neglect of the employees of the other; and in case of collision between the trains of the two parties, the one in fault shall pay all damages, and when neither is at fault each shall bear its own loss and damage.

When an injury or damage to persons or property shall be caused by the operation of trains over the railway between and including Denver and South Pueblo, and it cannot be determined which party operated the train which was the cause of such injury or damage, the cause shall be regarded as concealed, and the compensation made to the injured shall be apportioned to and paid by the parties hereto on the basis of wheelage for the month in which the accident occurred, as provided in Section 2, Article II., hereof. The Denver Company is authorized to settle and adjust all claims for injuries from such concealed causes, and the Chicago Company will be bound by such settlements and adjustments, unless it can show that they were not made in good faith. Rec. p. 22.

It is expressly understood that neither party shall be concluded by any judgment against the other, unless it has had reasonable notice that it is

CONTRACT.

required to defend the same or be so bound, and has reasonable opportunity to make such defense. When such notice and opportunity have been given, the party notified will be concluded by the judgment as to all matters which could have been litigated in such suit. Any other question which may arise as to the obligation, liability or duties of the parties, or either of them, in regard to the subject matter of such suit, shall be determined, when the parties are unable to agree, by reference as herein provided.

SEC. 9. This contract shall attach to and run with the railways of the respective parties during the corporate existence of each, and of all extensions of such existence, by renewal or otherwise, and shall be binding upon the lessees, assigns, grantees and successors of each, during the continuance of their several corporate existences; provided, however, that the Chicago Company can assign its interests in this contract only by sale, lease or consolidation of its own property.

It is understood that this agreement is subordinate to the existing mortgages on the Denver Company's property and franchises, and to the bonds issued and to be issued thereunder. It is also agreed that the Denver Company may hereafter issue a further mortgage, which shall also have priority over this contract upon its entire system, securing an issue of bonds not exceeding $35,000 per mile, for the sole purpose of improving, bettering and equipping the property now owned and hereafter to be legally constructed or acquired by it, with the proceeds of the bonds secured by its mortgage, dated July 15, 1886.

It is expressly agreed that if the Denver Company, its successor, assigns or grantees, shall be divested of title to the property described in Article

L., Section 1, hereof, by any decree or judgment of any Court made in the enforcement of any mortgage, incumbrance, lien or charge upon said property, which shall have priority over this contract, or if said Denver Company shall execute any mortgage, deed of trust or other conveyance in substitution for, or in extension or renewal of any mortgage, incumbrance, lien or charge which shall then have priority over this contract, then such sale, decree, mortgage, incumbrance, conveyance or extension shall, at the election of the Chicago Company, declared in writing, operate to release both parties from any obligation to thereafter perform the covenants, promises and agreements in this contract contained; provided that, in case of the renewal or extension of such prior mortgages or liens, such election shall be signified, in writing, within six months after notice of the execution and recording of such renewal or extension, and shall take effect six months after such notice. CONTRACT

1 Rec. p. 23.

The Denver Company may admit any other company operating a connecting railway to the possession and use of said railway between Denver and South Pueblo, or of any portion thereof, with itself and the Chicago Company, upon substantially the same terms as those set out in these articles; provided, however, that the compensation which shall be charged for such use shall not be less than that which the Chicago Company shall thereafter be required to pay for the use of the same, after it shall be credited with its proportion of the compensation paid by the lessee, to be ascertained as hereinbefore provided.

SEC. 10. The Chicago Company shall, on or before the 1st day of April, in the year 1888, notify the Denver Company whether or not it elects to build its line aforesaid from said point on the

CONTRACT. western boundary line of the State of Kansas to said Colorado Springs. If it shall elect to build said line, it agrees to complete the same and to occupy the line of the Denver Company, and to be bound by the terms of this contract, on or before the 31st day of December, in the year 1889. If it shall elect not to build said line, this contract shall on the said 1st day of April, in the year 1888, become void and of no effect.

It is further distinctly understood, that this contract shall not be obligatory upon either party until approved by the votes of two-thirds in par value of the capital stock outstanding of each company, at meetings convened and held, in manner and form as provided by the laws of the State of Colorado, prior to the 15th day of June, in the year 1888.

SEC. 11. This contract is intended to permit either party hereto to exchange business with other companies, in carload lots or otherwise, and, in the ordinary exchange of business, in the cars of such other companies. Neither company, however, shall have the right to haul the passenger trains of any other railway company over said line of railway without the consent of the other party hereto, except that the right of the Denver Company to haul passenger trains of the Missouri Pacific Railway Company over the line of railway aforesaid is hereby conceded.

SEC. 12. If the Chicago Company shall fail to make the payments herein provided as the same shall become due, and such failure shall continue for six consecutive calendar months after an admitted default, or a default adjudged by the referees or a Court of competent jurisdiction, then, and in such case, this indenture and the terms therein named shall, at the option of the Denver

Company, cease, terminate and become void thenceforward, and the Denver Company may re-enter and take possession of all of said described property as of its first and former estate. CONTRACT. Rec. p. 4

SEC. 13. (Arbitration clause.)

SEC. 14. No difference which may arise as to the construction or performance of any of the covenants, promises and agreements herein contained shall affect, while it remains undetermined, the joint use of the railway of the Denver Company by the Chicago Company in the manner in which said last mentioned company has theretofore enjoyed such use, but such use shall continue, and settlements and payments be made, as before the existence of such difference, and when it is finally determined by reference, as above provided, or otherwise, payments and restitutions shall be made by the respective parties, as may be required by the award of the referees, or provided in agreement of adjustment, as the case may be. Rec. p. 5.

SEC. 15. If, for any reason, any of the covenants, promises and agreements in any of these articles expressed, and not material to the right of the Chicago Company to use the railway described in Article I., Section 1, hereof, shall be adjudged void, such adjudication shall not affect the validity or obligation of any other covenant, promise or agreement which is in itself valid. A controversy as to the construction or validity of any covenant, promise or agreement shall not delay the performance of any other. In the event of a failure in law of any of the covenants, promises or agreements herein contained, such steps shall be taken and contract made as shall be advised by counsel to carry into effect the purposes and intent hereby expressed.

IN TESTIMONY WHEREOF, said companies have

CONTRACT. caused this contract to be signed by their respective Presidents, attested by their respective Secretaries, and their respective corporate seals to be hereunto affixed, the day and year first above written.

[SEAL.] R. B. MINTURN,
Vice-President of the Denver and Rio Grande Railroad Company.

Attest:

WM. WAGNER, *Secretary.*

[SEAL.] R. R. CABLE,
President of the Chicago, Rock Island and Colorado Railway Company.

Attest:

W. G. PURDY, *Secretary.*

RECORD. (Acknowledgment.)

EXTRACT FROM LAWS OF KANSAS.

(1163) *Road Company*, § 7. The charter of a road company must also state— Route and Termini.

First—The kind of road intended to be constructed.

Second—The places from and to which the road is intended to be run.

Third—The counties through which it is intended to be run, and—

Fourth—The estimated length of the road.

Gen. St. Kans. (1889), Vol. I., p. 374.

STATUTE OF COLORADO RELATING TO THE CONSOLIDATION OF RAILROAD COMPANIES.

353. What may consolidate—Domestic with foreign except—Parallel and competing.

SEC. 117. (1) It shall and may be lawful Consolidation. for any railroad company or corporation, organized or existing under the laws of this State, and whose line of road is made or is in process of construction to the boundary line of the State, or to any point either in or out of the State, under authority of its laws, to merge and consolidate its capital stock, franchises and property into and with the capital stock, franchises and property of any other railroad company or companies or corporations, organized and existing under the laws of any adjoining State or Territory, whenever the two or more railroads of the companies or corporations so to be consolidated shall or may form a continuous line of railroad with each other or by means of any intervening railroad; and roads running to the bank of a river, which is not bridged, shall be held to be continuous under this section; provided, that nothing in this act contained shall

COLORADO STATUTE.

Consolidation.

be taken to authorize the consolidation of any company or corporation of this State with that of any other State or Territory, unless the laws of such other State or Territory permit or authorize such consolidation; provided, further, that parallel or competing lines of railroad shall not be consolidated. (Session Laws 1883, Section 1, page 118.)

354. Conditions, provisions and restrictions under which may consolidate.

SEC. 118. (2) Said consolidation shall be made under the conditions, provisions, restrictions, and with the powers hereafter in this act mentioned and contained, that is to say:

1. The Directors of the several corporations proposing to consolidate may enter into a joint agreement, under the corporate seal of each company, for the consolidation of said companies and railroads, and prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new corporation, the number and names of the Directors and other officers thereof, and who shall be the first Directors and officers, and their places of residence, the number of shares of the capital stock, the principal place of business of the new company in each State or Territory traversed by its line of railway, and such other provisions as may be required by law to be inserted in an original certificate of incorporation, the manner of converting the capital stock of each of said companies into that of the new corporation, and how and when Directors and officers shall be chosen, with such other details as they shall deem necessary to perfect such *new organization* and the consolidation of said companies or railroads.

New corporation.

2. Said agreement shall be submitted to the

COLORADO STATUTE.

Consolidation.

stockholders of each of the said companies or corporations at a meeting thereof, called separately for the purpose of taking the same into consideration. Due notice of the time and place of holding such meeting, and the object thereof, shall be given by written or printed notices addressed to each of the persons in whose names the capital stock of said companies stands on the books thereof and delivered to such persons respectively, or sent to them by mail when their post-office address is known to the company, and also by a general notice published in some newspaper in the city, town or county where such company had its principal office or place of business; and at the said meeting of stockholders, the agreement of the said Directors shall be considered, and a vote by ballot taken for the adoption or rejection of the same, each share entitling the holder thereof to one vote; and said ballots shall be cast in person or by proxy, and if a majority of all the votes of all the stockholders shall be for the adoption of said agreement, then that fact shall be certified thereon by the Secretary of the respective companies, under the seal thereof, and the agreement so adopted or a certified copy thereof shall be filed in the office of the Secretary of State, and shall from thence be deemed and taken to be the agreement and act of consolidation of the said companies, and a copy of said agreement and act of consolidation, duly certified by the Secretary of State, under the seal thereof, shall be evidence of the existence of said new corporation; provided, that if the mode of ratifying said agreement of consolidation in such other State or Territory shall vary from the mode herein prescribed, then such agreement may be ratified by the railroad company or corporation of such other State or Territory, in the mode prescribed by the

New corporation.

CONSOLIDATION STATUTE. laws thereof. (Session Laws 1883, Section 2, pages 117-18.)

355. Consolidation deemed one corporation.

Consolidation. SEC. 119. (3) Upon the making and perfecting the agreement and act of consolidation as provided in the preceding sections, and filing the same or a copy with the Secretary of State as aforesaid, the several corporations, parties thereto, shall be deemed and taken to be one corporation by the name provided in said agreement and act, possessing within this State all the rights, privileges and franchises, and subject to all the restrictions, disabilities and duties of each of such corporations so consolidated. (Session Laws 1883, Section 3, pages 119-20.)

356. Property of each transferred to consolidation.

SEC. 120. (4) Upon the consummation of said act of consolidation, as aforesaid, all and singular the rights, privileges and franchises of each of said corporations, parties to the same, and all the property, real, personal and mixed, and all debts due on whatever account, as well as of stock subscriptions and other things in action, belonging to each of such corporations, shall be taken and deemed to be transferred to and vested in such new corporation without further act or deed; and all property, all rights of way, and all and every other interest shall be as effectually the property of the new corporation as they were of the former corporations, parties by said agreement; and the title to real estate, either by deed or otherwise, under the laws of this State (or) of the United States, vested in either of such corporations, shall not be deemed to revert, or be in any way impaired by

New corporation.

reason of this act, nor shall the lien, operation or effect of any trust deed or mortgage heretofore executed by any of the corporations so consolidating be in anywise divested, impaired or affected; and the new corporation shall have the right to execute any future trust deed or mortgage upon its property as shall be provided in the agreement of consolidation, not inconsistent with the laws of this State, and all debts, liabilities and duties of either of said companies shall thenceforth attach to said new corporation, and be enforced against it, to the same extent as if said debts, liabilities and duties had been incurred or contracted by it. (Session Laws 1883, Section 4, page 120.) Co. ORADO STATUTES. Consolidation.

357. Offices—One in this State—May change.

SEC. 121. (5) Such new company shall, as soon as convenient after such consolidation, establish such offices as may be desired, one of which shall be at some point in this State, on the line of its road; and may change the same to any other point in this State at pleasure, giving public notice thereof in some newspaper published in this State. (Session Laws 1883, Section 5, page 120.) New corporation.

EXTRACTS FROM COLORADO STATUTES RELATING TO THE LEASING OF RAILROADS.

360. Leasing Railroads—Jurisdiction.

SEC. 124. (1) Any railroad company organized or existing under the laws of this State, or under the laws of an adjoining State or Territory, may lease any part or all of a railroad constructed by another company in or without this State, if the lines of roads of such companies are Leasing railroads.

COLORADO STATUTES.

continuous and connected, and not competing or parallel, upon such terms and conditions as may be agreed upon between the companies, subject always to the existing laws of this State on the subject of corporations; but such lease shall not be deemed to exclude the jurisdiction of this State over the control or regulation of such leased railroad. (Section 1, page 68, Acts 1881. Approved, February 18, 1881. In force, May 19, 1881.)

Leasing railroads.

301. Stockholders' vote—Notice.

SEC. 125. (2) No such lease shall be perfected until a meeting of the stockholders of each of the companies has been called for that purpose, on thirty days' notice to each stockholder, and in such manner as is provided for the annual stockholders' meetings, and the holders of at least two-thirds of the stock of each company, in person or by proxy, at such meeting assent thereto. (Section 2, page 68, Acts 1881. Approved February 18, 1881. In force May 19, 1881.)

Office Supreme Court U. S.
FILED,
JAN 6 1892
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1891.

THE CHICAGO, ROCK ISLAND and PACIFIC RAILWAY COMPANY,
Complainant and Appellant,
vs.
THE DENVER and RIO GRANDE RAILROAD COMPANY,
Defendant and Appellee.

APPEAL NO. 1695.

THE DENVER and RIO GRANDE RAILROAD COMPANY,
Defendant and Appellant,
vs.
THE CHICAGO, ROCK ISLAND and PACIFIC RAILWAY COMPANY,
Complainant and Cross Appellee.

CROSS APPEAL. NO. 1711.

Appeal and Cross Appeal from the Circuit Court of the United States, District of Colorado.

REPLY FOR THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY TO THE ARGUMENT FOR THE DENVER AND RIO GRANDE RAILWAY COMPANY.

THOS. F. WITHROW,
THOMAS S. WRIGHT,
A. E. PATTISON,
FOR COMPLAINANT AND APPELLANT.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1891.

THE CHICAGO, ROCK ISLAND and PACIFIC RAILWAY COMPANY,
Complainant and Appellant,
vs.
THE DENVER and RIO GRANDE RAILROAD COMPANY,
Defendant and Appellee.

APPEAL NO. 1695.

THE DENVER and RIO GRANDE RAILROAD COMPANY,
Defendant and Cross-Appellant,
vs.
THE CHICAGO, ROCK ISLAND and PACIFIC RAILWAY COMPANY,
Complainant and Cross Appellee.

CROSS APPEAL. NO. 1711.

Appeal and Cross Appeal from the Circuit Court of the United States, District of Colorado.

REPLY FOR THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY TO THE ARGUMENT FOR THE DENVER AND RIO GRANDE RAILWAY COMPANY.

The record in this cause covers over 1,200 printed pages, which have been condensed into the 135 pages in the abstract of record presented by complainant. This is not the "concise abstract or statement of the case" it would have been if all matter deemed by complainant's counsel to be utterly irrelevant and immaterial had been excluded, or if, instead of reprinting verbatim the testimony as to the effect of which counsel were not agreed, we had stated its substance as we understood it. This abstract was conscientiously prepared for the purpose of presenting in the smallest space consistent with clearness the basis of the contention of *each* of the parties. To

ABSTRACT OF RECORD.

facilitate the verification of statements and the correction of any errors unintentionally made, references to the record were placed on the margin of each paragraph. The duty of the appellee, when the abstract "presented by the plaintiff or appellant is controverted," is made plain by the rule and well settled by the practice. This duty was emphasized in this case by the fact that appellee is also a cross-appellant. Instead of presenting an abstract pointing out and correcting alleged errors in the one presented by appellant, they submit an elaborate argument to which is prefixed a "preliminary statement" which covers two pages, and in which there is no suggestion of any errors in, or omissions from the abstract submitted by complainant. Statements of fact are made in this argument, and supported by over two hundred direct references to the record; from which we infer that defendant's counsel regard the record itself as the "concise abstract or statement of the case," required of appellee when the abstract furnished by appellant is controverted. About fourteen and one-half pages of this argument are occupied by *verbatim* quotations from the testimony, eleven of which are also copied *verbatim* in the abstract; and of the three pages and a fraction not so copied in the abstract, two are concisely and fairly stated. The trivial character of the actual discrepancies between the testimony as stated in the argument and as presented in the abstract will appear in the following argument and foot notes.

Deft.'s Arg., p. 78.

This is the only showing made against the fairness of this abstract. Yet the learned counsel declare an "emphatic protest against the so-called 'abstract of record' filed by the defendant in this case, and the map accompanying the same;" that "this 'abstract of record' is really an argument on behalf of the plaintiff;" that it "states in many places the effect of the testimony, as construed by plaintiff, instead of the testimony itself;" that "the effect of the contract from the same partisan view, is presented instead of the language of the contract;" that "the map does not represent anything that was sub-

"mitted as a map in the taking of evidence, but is a com-"bination made by appellant's counsel of parts of various "maps, thereby distorting the appearance of the whole;" that it is a "conglomerate production," and that attaching it "to an 'abstract of record' as representing any-"thing that was produced in the testimony amounts to a "gross misrepresentation."

In another place the abstract is referred to as "the ar-"gument denominated the 'abstract of record'."

It is true, that when we understood there was no controversy as to the effect or substance of testimony, we attempted a "concise abstract" thereof. If this was not accurately or fairly done, the references to the record made correction easy. But one attempt is made in defendant's argument to show that a statement is inaccurate: and to that reference will be made hereafter. If there is any word or line on the abstract map which is not found on some one of the three maps which it represents, the attention of the court should be called thereto. This "combination," "conglomeration," "gross misrepresen-"tation" consists of three maps, brought to the same scale and laid over each other. The real objection is, not that it distorts "the appearance of the whole," but it shows to the eye the relations of the "shops at Burn-"ham" as shown by the Cable map to those shown by the Smith map, and of the "proposed yard" to both. We will have occasion to allude to this hereafter.

We now propose to restate the propositions and subordinate propositions presented by defendant's counsel in this argument, appending to each such words of reply as may seem proper.

I.

DENVER TERMINALS.

Deft.'s Arg., p. 3.

Abst., p. 45.

"THE COMPLAINANT IS NOT ENTITLED, NOR HAS IT ANY RIGHT TO BRING ITS ENGINES, CARS OR TRAINS OVER THE TRACKS OF THE UNION PACIFIC RAILWAY COMPANY INTO OR UPON THE DENVER TERMINALS OF THE DEFENDANT COMPANY."

Complt.'s Arg., p. 34.

"1. *The granting clause does not alone determine the "character, terms or conditions of the use granted.*"

Opinion of Mr. Justice MILLER.

It is not a matter of surprise that the discussion of the first proposition stated in this argument is introduced by an extract from the opinion filed herein by Mr. Justice MILLER, so garbled as to do injustice to the learned and lamented jurist as well as to the counsel who prepared the opening argument for complainant. Mr. Justice MILLER discussed the contract *with regard to the use of the Denver terminals.* In stating the case he said:

Deft.'s Arg., p. 4.

46 Fed. Rep., 145.

"The object of the bill is to enforce certain rights, which the Chicago and Rock Island Company, as I shall call it generally, claims to the use of what is called the 'terminal facilities,' of the *Denver end* of the road of the Denver and Rio Grande Railroad Company."

The other questions passed upon by the learned justice were preliminary to the decision of this ultimate question submitted to his consideration. He said, prefatory to the language quoted in complainant's argument:

46 Fed., 147, 148

"It is claimed by the Denver and Rio Grande Railroad Company that this contract did not oblige them to carry for the original contracting party any freight, passengers, or other subject of railroad traffic other than such as might come to the city of Colorado Springs. It is claimed that there is no real right in the 'Chicago Railway,' as it is called in this contract, to take up or to land the property, traffic, freight or passengers at the Denver end of this road at all; that it must enter, as I understand, by Colorado Springs; and that they have no right to enter upon the use of this road any where else; and, if they are not correct in that rigid construction of the contract, they insist that the cars which the Chicago, Rock Island and Pacific Railway Company now run into this yard of the Denver and Rio Grande Railroad Company are no part of the traffic included in this contract."

* * * * *

"I do not propose to go *into those parts of the contract which are supposed to limit and qualify, and make exception to the general language of the contract*, further than to say, in general terms, that the whole of the contract seems to me devisible into two or three purposes and objects."

DENVER TERMINALS.
Opinion of Mr. Justice MILLER.
46 Fed. Rep., 148.

In the last paragraph of the opinion is the language quoted in complainant's opening argument. It is not necessary to remind this court of the manner in which Mr. Justice MILLER usually ignored all matters not material to the decision of *the exact question* under consideration. When he said that he did not believe in "any "limitation upon the right" of complainant to use the Denver and Rio Grande Railroad, he meant any limitation affecting the question then before him. Complainant's counsel have not admitted in the opening argument that "any" such limitations are found in the contract. In leaving this matter it may not be amiss to suggest that the learned counsel for defendant would have exhibited a higher degree of discretion by following the example set by the learned judge of the Circuit court, who overruled and reversed Mr. Justice MILLER without referring to his opinion printed in the record.

Comp. Arg., p. 35.

It is said in this argument: "We shall not differ "with the complainant as to the definition of the "words, 'full,' and 'equal;' but they must be taken "with the limitation which the context *requires*." But what the context *requires* must be stated in language certain and clear as the words, "full" and "equal." The lessor grants to the lessee the "full, "equal and joint possession and use." Limitations upon the use described by these words must be as certain and unequivocal as the words themselves; and the words by which they are expressed will be construed most strongly against the grantor or lessor. The learned counsel contend that the "full, equal and joint use" is limited to the traffic which comes upon the line at Colorado Springs. Such a limitation could have been expressed in a few words. Is it so expressed in any section of the contract? Fifty printed pages of this argument are

Limitations on use.
Deft.'s Arg., p. 4.

DENVER TERMINALS. *Limitations on use.*

devoted to a statement of exceptions and limitations which, it is claimed, are appended to a section consisting of a dozen lines, in a contract all of which covers but twenty pages. This statement suggests that which is made apparent by an inspection of the argument, that these exceptions and limitations consist in strained and attenuated inferences, originating in the argument, and having no place in the contract.

Deft.'s Arg., p. 5.

"**2.** *The preceding and subsequent provisions of the "contract show limitations of the character and extent of "the use granted.*"

Deft.'s Arg., p. 6.

In the discussion of this subordinate proposition it is asserted that the Rock Island Company "is claiming the "right to use the Denver terminals of the defendant "company for business brought thereon over their Union "Pacific tracks, *the same being business which does not "come for any distance whatsoever over the line of the "defendant*, thereby crowding the Denver terminals of "the defendant with business from which it *derives no "revenue under the method of computation set forth in the "contract*."

The statement is inaccurate in several respects. It is not true that traffic from the Union Pacific does not pass "for any distance whatsoever over the line of the defend-"ant" in being transferred from the tracks of the first named company to the yards of the Denver and Rio Grande. The main line of the last named company extends *through* its yards at Denver to a connection with the tracks of the Union Pacific several hundred feet north of the northern boundary of the terminal yard. Traffic cannot be moved from the Union Pacific into the yards of the Denver and Rio Grande at Denver without passing over the main line of the last named company's tracks, "embraced in the method of computation set forth in the "contract."

Neither is it true that the Denver and Rio Grande "derives no revenue under the method of computation

"set forth in the contract." In another part of the argument the learned counsel admit that "it is true that the "Chicago Company pays two and one-half per cent. per "annum on the value of the property for the *right* to "use it." The value of the Denver terminals was placed by Mr. Smith at $700,000, when the contract was made, and to this $104,000 have since been added—making the value of this property fully one-fourth of the value of the entire property demised. The complainant not only pays two and one-half per cent. on one-half of this valuation, while it has but ten per cent. of the use; but it pays the like per cent. upon one-half of the agreed value of the property from Denver to and including Pueblo, of which it has but seven and one-half per cent. of the use. These facts are not only not controverted, but are admitted by the counsel who assert that the Rio Grande Company "derives no revenue" for this use of the Denver yards "under the method of computation set "forth in the contract." If the Rock Island Company should abandon the Rio Grande Railway south of Denver, and use one-half of the capacity of the yards at that place—all that it can use under the contract if the lessor needs the other half—it would receive a rental of twenty per cent. per annum upon its valuation of the property used. This is the grossest injustice to which the defendant can be subjected. It might be compelled to accept a rental equal to twenty per centum per annum of the value of the property demised; and this is the manner in which it would "derive no revenue under the method of com-"putation set forth in the contract."

DENVER TERMINALS.
Limitations on use.

Deft.'s Arg., p. 44.

Abst., p. 60.

Comp. Arg., 22, 58–63.

Comp. Arg., pp. 65–66.

But, say the learned counsel, the complainant "pays "two and one-half per centum on the value of the prop-"erty for the *right* to use it, but for the *exercise* of that "right it must make further payments of expenses occa-"sioned by the use." There is something novel at least, in this proposition. The owner of the *right* pays for the privilege to *exercise* it. The owner of the fee has an unrestricted dominion, but he must acquire the right to

Deft.'s Arg., pp. 44, 45.

DENVER TERMINALS. *Limitations on use.*

exercise such dominion by paying an additional compensation therefor. The learned counsel for the defendant are driven into this picturesque absurdity by the exigencies of the argument. It will not answer their purpose to admit that all that is paid in addition to the two and one-half per cent. of the value is a contribution to the expenses of maintenance and joint operation, and is in no proper sense a rental reserved as compensaation for the right to use. Suppose the Rock Island should abandon the Denver line without a cancellation of the lease, would not the rental, the two and one-half per centum, continue though the contribution to maintenance and joint operation would cease? The theory of defendant's argument was presented to Mr. Justice MILLER, and he held that the payment of the expenses which would be incurred in maintaining and jointly operating the line "did not affect "or determine" and were not "important in construing "the original contract by which the interest of the Den- "ver and Rio Grande Railroad was conveyed to the "plaintiff."

Complainant's contention.

Abst., p. 6.

Deft.'s Arg., p. 138.

There is nothing complicated or difficult to the understanding in this matter. The contract in a nut-shell was, the lessee was to have the "full, equal and joint posses- "sion and use" for a rental equal to two and one-half per centum per annum upon an agreed valuation; and was to pay a proportion of the expenses of maintenance and joint operation, which proportion it was agreed should be ascertained in a certain way. The property to be kept in repair was the entire railway—including the yards. The proportion was to be "as the "number of wheels per mile run by it, the Chi- "cago Company, over said railway or any part thereof "bears to the whole number of wheels per mile run "over the same during the same period." Another method might have been agreed upon by the parties. It might have been the proportion of wheelage passing by Palmer Lake, or any other given point. If such an arrangement had been agreed upon could it be insisted that all traffic

Contract, Art. II., § 2, Cl. 4.

must pass by the point named? Or, suppose the complainant should acquire terminals at Denver other than those of the Denver Company, and while continuing to use the main line and other property should abandon the yards at that point, would it not be charged with a proportion of the expenses which would be incurred in maintaining the entire road, including the Denver terminals, on the basis of its wheelage on the main line? It would be so charged, not because the proportion of wheelage on the main line is equal to the proportionate use of every part of the property; but for the reason that it has been agreed upon as the standard by which all expenses incurred in maintaining the demised property and every part thereof shall be apportioned.

DENVER TERMINALS.

Complainant's contention.

But it is said that such basis of apportionment would not be fair, because it does not include the mileage made in the yards. That question was settled when the contract was made. This is the answer which would be made if complainant should now insist that it should not be required to pay interest on one-half the value when it has but seven and one-half per cent. of the use of the main line. As was shown in the opening argument, the discrepancy between the actual use which the lessee has and the two and one-half per cent. upon the value of the property is much greater than the difference between its proportion of the uses of the Denver yard and the proportion which it contributes to its maintenance and joint operation. The parties agreed upon one method for fixing the rental, and upon another for apportioning expenses, and one is as obligatory as the their. All expenses incurred on the railway and appurtenant property—on the main line and in the yards—were to be apportioned upon the basis of wheelage on the main line between Denver and Pueblo. The results of these methods do not operate as limitations upon any rights granted by one to the other.

Execution of grant not limited by rules for distributing cost of repairs, etc.

Complt.'s Arg., pp. 58-67.

But, say the learned counsel:

DENVER TERMINALS. *Pueblo.*

Deft.'s Arg., p. 86.

"—the parties understood and intended that the use by the two companies of the terminals would and should be practically proportionate to their use, respectively, of the railway from Denver and Pueblo."

Abst., p. 108.

If it was so understood by the defendant, why has not that rule been applied at Pueblo? In the opening argument we showed that sixty-two per cent. of the Denver and Rio Grande traffic in the yards at Pueblo does not move one foot over any portion of the tracks between that place and Denver; that but thirty-eight per cent. of that traffic passes over those tracks; that but twelve and one-half per cent. of that was traffic of the Rock Island Company, while eighty-seven and one-half per cent. was traffic of the Rio Grande; that of the entire use of the yards, four and three-fourths per cent. was by the Rock Island, and ninety-five and one-fourth per cent. by the Rio Grande. Has the Denver and Rio Grande limited its use of the yards at Pueblo to the proportion of the wheelage "on said railway between Denver and Pueblo?" This question is answered in the record: the answer is restated in the opening argument for complainant, and is not disputed in the argument for the defendant. The Rio Grande Company not only uses the yard at Pueblo for a traffic, sixty-two per cent. of which never passes north of that city, but it refuses to take this use into account in apportioning the expenses of maintenance and joint operation. The situation at Pueblo was fully presented in complainant's opening argument—but it elicited no answer from the counsel for the defendant.

Comp. Arg., p. 60.

Crowding Denver terminals.

Deft.'s Arg., p. 6.

But the learned counsel complain because traffic brought in by way of the Union Pacific, is "*crowding* the Denver terminals of the defendant." We respectfully suggest that in view of the facts that the Rock Island pays for fifty per cent. of the capacity of the Denver yard, and has but ten per cent. of the use, which covers its traffic by way of the Union Pacific, the phrase quoted, does not correctly describe the situation. Would it not be more accurate to say: "reducing the fifty per

Abst., p. 107.

cent. of use for which the Rock Island pays, but which the Denver and Rio Grande enjoys." DENVER TERMINALS.

"(*a.*) *The Chicago Company's line to which the contract applies was to run via Colorado Springs.*" Deft.'s Arg., p. 9.

This point is sufficiently discussed in complainant's opening argument. Complt. Arg., p. 54.

("*b.*) *Supplies to be furnished by Denver Company were only for use on the Denver line.*" Deft.'s Arg., p. 10.

Certainly a very remarkable provision of it was understood that *no other* than the Denver line was to be used. Article 1, section 5 of the contract is as follows: *Engine Houses at Denver and Pueblo.*

"SEC. 5. It will at the commencement of said term, if so required by the Chicago Company, provide, and during the continuance thereof maintain, *at Denver and South Pueblo*, for the exclusive use and control of said Chicago Company, engine houses conveniently located and having the necessary fixtures and sufficient capacity to properly and safely shelter all locomotive engines which said company may have occasion to use *on the railway of the Denver Company*." Deft.'s Arg., p. 136.

Concerning this we asked in the opening argument:

"Why this limitation to the railway of the Denver Company if it was understood at the time that the Chicago Company would operate no other?" Comp. Arg., pp. 36 and 37.

This is answered by the learned counsel:

"— the other railway so to be operated was the Chicago Company's line extending from the west boundary of Kansas to Colorado Springs." Deft.'s Arg., pp. 10 and 11.

But if "the other railway so to be operated" was to touch the Denver and Rio Grande *only* at Colorado Springs why the provision to exclude its engines from the engine houses "*at Denver and South Pueblo?*" The engines used on the railway "extending from the west "boundary of Kansas to Colorado Springs" could not reach "Denver and South Pueblo" without being used on "the railway of the Denver Company;" and for that reason they could not be excluded. The only engines which can be excluded are those which the Rock Island Company "may have occasion" to operate into Denver and South Pueblo over railways *other* than the Denver and Rio Grande.

DENVER TERMINALS

And this suggests the further question: If an *express* provision was deemed necessary to exclude the engines of the Chicago Company operated on other railways from the engine houses at Denver and South Pueblo, why was not a like express provision necessary to exclude like traffic and equipment from the yards at those points?

Deft.'s Arg., p. 11.

"(*c.*) *The provision for additional tracks for the Chicago Company was to facilitate interchange of traffic with connecting carriers.*"

Additional tracks

Compl. Arg., p. 37.

The third clause of section 1, Article III, of the contract, provides that, "if the Chicago Company shall, at any "time during the continuance of the term of this indenture, desire any side, spur or other tracks, other than "those above specified, connecting any track described "in Article I, section 1, hereof, *with its own tracks* or with "the tracks of any other railway company," it may require their construction by the Denver Company; and may construct them itself if that company refuses.

Because it did not occur to us that the words, "*with its own tracks*," were limited to its own tracks *at Colorado Springs*, the learned counsel assert that we "are not "affected by an excess of candor"—whatever that may mean. May we, in mitigation of the fault, if it is a fault charged, suggest humbly and respectfully, that the words "at Colorado Springs" are not written in the section quoted, but were first evolved from the inner consciousness of the learned counsel for the defendant, when their argument in this case was prepared. It may be that we should have known by intuition that a consciousness so capacious and prolific would bring forth this amendment to and limitation of this section, yet we solemnly protest that no such intuition came.

It is said, "while *a* connection had been provided for "and agreed at Colorado Springs, yet it *might* well be that "after connections made, additional connections by side "tracks, double tracks, etc. might be required." This is manifestly within the range of the possible, as was the fact

that such connections *might* be desired between the tracks of the Denver railroad and "its own tracks" at other points, particularly at Denver, to which point it proposed to acquire or construct a branch line. Is not one quite as palpable a possibility as the other? It is further said that the lessee, for the accommodation of through business, might require connections with "other railways" at Colorado Springs, Denver and Pueblo; and that this "provision was manifestly inserted in the contract so as "to give the Chicago company ample opportunities to "carry through and even transcontinental traffic, via "Colorado Springs to and from connecting lines extending "westward from Denver, Colorado Springs and Pueblo; its "only object was to facilitate interchange of traffic with "connecting lines; and to give convenient access to indus-"tries as sources of traffic." This might explain the provision for connections with "other railways," but it does not meet the point made as to connections between the tracks of the Denver railway and those of the Chicago Company, unless such right to connect is limited to Colorado Springs.

DEEVEL TERMINALS.

Dft. Arg. pp. 12, 13.

"(*d.*) *The rentals were dependent upon a connection "at Colorado Springs.*"

Dft. Arg. pp. 13, 15.

"(*e.*) *The Chicago Company's covenant as to its cor-"porate power related only to the line to Colorado "Springs.*"

Complt. Arg., p. 55. Deft.'s Arg., p. 15.

These points were anticipated in complainant's opening argument; and to what was then said we do not care to add anything.

Comp. Arg. pp. 54, 55.

"(*f.*) *The provision for a special connection at Pueblo "excludes any other not mentioned in the contract.*"

Deft.'s Arg., p. 15.

Complainant's views touching this proposition are presented in its opening argument. The defendant in its answer attempts to break the force of the proposition that this special provision was made for a railway which would not connect with or form a part of the Chicago Company's line — a special provision made for a special line

Special connection at Pueblo.

Complt. Arg., pp. 50-52.

DENVER TERMINALS. *Special connection at Pueblo.*

which had no application to railroads which formed a part of a system of which the Chicago Company's road formed a part, or which were connected with it. The learned counsel were pleased to describe the argument as "ingenious," and to present certain points of reply to which we will give brief attention:

(1.) It is first insisted that the road from Limon to Denver did not, when the contract was made, form a part of the "system of railways of which the Chicago Company will form a part," mentioned in the second clause of the preamble; and that the Rock Island system did not extend beyond the western boundary of the State of Kansas. The general counsel for the Denver Company understood this better when he was supervising the preparation of the articles of incorporation of the Chicago Company, the settlement of this contract, and the consolidation of the Chicago, Kansas and Nebraska with the Chicago Company. The meeting of the stockholders which approved the contract approved the consolidation, and that meeting was held under his supervision, or the supervision of his associate in this case who then represented him. He then understood that he was organizing the "Colorado end of the Rock Island railroad." Without regard, however, to this, the language of the preamble shows that through lines were to be established between all points on the line of the Denver Company between and including Denver and Pueblo and all points on the line of railway "which will be operated by the Chicago "Company and on the system of railways of which the "Chicago Company will form a part;" and the contract secures to the Chicago Company "the right to transport "persons and property between stations on its railway "and connecting lines and all points between and including Denver and South Pueblo."

Abst., p. 35-40.

Abst., p. 39.

Abst., pp. 5 and 8.

Two facts cannot be disputed:

1. The Rock Island system now embraces the Chicago, Rock Island and Pacific, the Chicago, Kansas and

Nebraska, and the Chicago, Rock Island and Colorado railways. 2. The railway from Limon to Denver is "a "connecting line," both with regard to the system and the railway owned when this contract was made, by the Chicago, Rock Island and Colorado.

DENVER TERMINALS. *Special connections at Pueblo.*

The learned counsel dwell upon the system as it was when the contract was made—insisting that it terminated at the western boundary of Kansas. It would not be material if this were true. The rights were secured to the system "of which the Chicago company *will* form a "part."

It is not necessary to spend time or space with the proposition that the Chicago Company's was the "connect-"ing line referred to in Article III, section 4.

But the learned counsel further contend that the Rock Island might build from Pueblo in a northeasterly direction to a connection with the railway of the Chicago company "at Limon or some other point in eastern Colorado "situated in reference to Pueblo, one terminal of the Den-"ver line, exactly as the present Limon line is in refer-"ence to the other terminal." We ask the court to examine this statement in connection with the map set out as Exhibit A to the argument for the defendant. If a direct line could be built from Limon to Pueblo (which would be impossible) it would be eighty-four miles long. A line only fifty miles long from Pueblo to a connection with the railway of the Chicago Company would be close to and parallel with the Denver Company's railway between Pueblo and Colorado Springs. A direct line from Limon to Colorado Springs, thence to Pueblo, is about one hundred miles. A line direct from Limon to Pueblo would be sixteen miles shorter than the sum of the direct distances by way of Colorado Springs. The actual line from Limon to Denver is sixty-four miles shorter than by way of Colorado Springs. The Denver railroad passes over a gap at Palmer Lake, the summit of which is reached by climbing seventy-five feet

Dett.'s Arg., pp. 19 and 20.

Abst., p. 108.

DENVER TERMINALS.

Special connections at Pueblo.

in the mile. The evidence is silent as to the grades between Colorado Springs and Pueblo, but the conformation of the country indicates that those down the valley are not as heavy as would be those on a direct line from Pueblo to Limon. If the Rock Island Company should construct and operate a railway from Limon to Pueblo, it would draw traffic from its line between Limon and Colorado Springs, continue to pay rental for the Denver Company's railway from Colorado Springs to Pueblo, and construct and operate eighty-four miles of railroad—to shorten the haul, possibly, sixteen miles. If defendant's "might-be" should be realized, it would not only incur this enormous expenditure but would abandon its traffic to and from all stations between Colorado Springs and Pueblo, receiving in exchange the right to carry traffic between points on the direct line and Denver. And what would be the value of this right for which such a price would be paid? The line from Limon to Pueblo would pass entirely over plains which produce only cactus and prairie dogs. What traffic is produced by that country which would pass over two sides of a triangle between stations on that line and Denver? Will any court assume that intelligent railway managers ever contemplated any such arrangement? The parties made provision for traffic between Denver, and points on a railway which the Chicago Company might acquire extending not less than fifty miles from Pueblo. The existence of large mineral deposits within a hundred miles of Pueblo, and a market for the same at Denver, makes clear the purpose of this provision for a special line which was not to be connected with the railway of the Chicago Company, or with the system of which it would be a part.

Contract runs with railroad.

Dft. Arg. p. 20.

"(g.) *The contract is attached to and cannot be severed from the Chicago Company's railway line.*"

The defendant's counsel say under this sub-proposition:

Deft.'s Arg., p. 21.

"It is to be observed that that the Chicago Company has never built or acquired a line from Limon to Denver, neither

DENVER TERMINALS.
Contract runs with railroad.

has its successor by consolidation, the Chicago, Kansas and Nebraska Railway Company. But the Rock Island Company as a lessee of both lines, severs from the one and gives to the other that which the contract strictly confined to the lines described therein."

Abst., pp. 25-38.
Complt. Arg., pp. 1 and 8.

The Chicago Company as a constituent of the consolidated Chicago, Kansas and Nebraska Company, transferred to the consolidated corporation all of its rights under the contract—as it had clear and undisputed authority to do. By the act of consolidation, all of the rights were transferred to the Chicago, Rock Island and Pacific Railway Company. The lessee had the rights of the consolidated company and the consolidated company those of the Chicago Company. If the Chicago Company could build or acquire a line "connecting" with its railroad at Limon and extending to Denver, and use it in connection with the line of the Denver Company, the Rock Island, exercising the same rights could do the same thing. The Rock Island Company has not as a lessee of both lines severed from one and given to the other. It has, as lessee of the railway of the Chicago Company exercised the rights conferred upon the Chicago Company. If this were not sufficient, the fact that the Rock Island Company's railway with the Chicago, Kansas and Nebraska, the Chicago, Rock Island and Colorado, the Union Pacific between Limon and Denver, and the Denver and Rio Grande between and including Denver and Pueblo, form one railway system, would be.

Concerning this the learned counsel also say:

Deft.'s Arg., p. 22.

"But this contract was not and could not become, without the consent of the defendant, a part of some other property. Being a part of the property described in the contract, the line from Colorado Springs, east, it could not be taken therefrom and made to attach to the other line."

All of this is answered by the contract:

Preamble.

Abst., p. 3.

"The interests of both parties and the public will be promoted by the establishment of a through line of railway between all of the points on the line of the railway of the Denver Company, between and including Denver and South Pueblo, *and all points on the line of railway which will be operated by the Chicago Company and on the system of railways of which the Chicago Company will form a part.*"

DENVER TERMINALS.

Contract runs with railroad.
Abst., p. 8.

The Chicago Company

"—shall have the right to transport persons and property between stations on its railway *and connecting lines* and all points between and including Denver and Pueblo."

The Chicago Company can

Abst., p. 12.

"—assign its interest in this contract by sale, lease or consolidation of its own property."

Abst., pp. 25-28.

Before the contract was approved by the stockholders of the Denver Company, the stockholders of the Chicago Company approved of the consolidation which incorporated the railway of the Chicago Company into the Rock Island system.

The Pullman Palace Car Co. *vs.* The Missouri Pacific Railway Co., 118 U. S. Rep. 395;
The Lancashire and Yorkshire Railway Co. *vs.* The East Lancashire Railway Co., 6 Eng. Ry. & Canal Cases, 816.

The learned counsel cite cases: *The Pullman Palace Car Company* v. *The Missouri Pacific Railway Company and the Lancashire and Yorkshire Railway Company* v. *The East Lancashire Railway Company* are invoked to overturn the express provisions of the contract. This court held in the Pullman case, that a consolidation created a new company, and a contract made by one of the constituent companies, before the consolidation, to extend over its entire line and over all railroads which it then controlled, or might thereafter control, by ownership, lease or otherwise, does not affect roads not so owned, leased or acquired at the time of the consolidation, but which are acquired by the new company subsequently to it. In a nut shell, this is, a road acquired by the new company after it is organized, is not a road acquired by one of the constituents before the consolidation. Does that cover this case? This contract was made before the consolidation. By its terms it provided for a transfer of the rights of the Chicago Company by consolidation, and the consolidated company by express words, accepted it as obligatory upon it. The rights of the constituent are the rights of the consolidated company, whether fixed with regard to the system of which the constituent company forms a part, or with regard to the railway of the constituent company and its "connecting lines."

DENVER TERMINALS.
Contract runs with railroad.

In the Lancashire and Yorkshire Railway Company case, the question is asked: "To what railway does the "agreement" for accomodations at a railway station "extend?" In considering the answer the court says: "Until therefore, we find an express extension of this agree"ment to the traffic of the present railways, we ought "not to hold it so extended. It is clear that the accomo"dations given must have been limited, and unless we "stop at the railways existing, we can find no limit what"ever." The limit of this agreement is expressly stated —it extends to the system of which that of the Chicago Company will form a part—it embraces the railway of the Chicago Company and all connecting lines.

"(*h.*) *The Denver Company's terminals are appurte-* Deft.'s Arg., p. 24.
"*nant to that company's railway alone.*"

If this were correct in what way would it affect any question in this case? The railway and the appurtenant property are covered by the lease.

"(*i.*) *Through business, under the contract, must pass* Deft.'s Arg., p. 26.
"*via Colorado Springs.*"

Further discussion of this proposition is unnecessary.

"(*j.*) *The contract was to be operative only upon election*
"*of route to Colorado Springs.*"

In support of this proposition the learned counsel collect the vague recollections, inferences and conclusions of witnesses relating to conversations which led up to the contract. It is not necessary to spend any time on them. They have already received more attention in the opening argument than they deserved.

"(*k.*) *The method of compensation for maintenance* Deft.'s Arg., p. 28.
"*and operation shows that the terminals were to be used*
"*only for business passing over defendant's main line.*"

This proposition has been discussed both in the open- Complt. Arg., pp. 38, 39 and 63.
ing argument and in this reply; and we care to add to what has been said only this, that it was not necessary to incumber the argument with quotations from depositions

DENVER TERMINALS.

of witnesses to show that it would be impracticable to keep exact accounts of wheelage made in the yard. There is no contention in complainant's argument that it is. Accounts of wheelage on the main line are only approximately correct.

Deft.'s Arg., p. 38.

"3. *The situation and condition of the Denver terminals shows that the contracting parties intended to use the Denver terminals in connection with the Denver Company's line alone.*"

To show the "situation and condition" of the yard, the learned counsel append to their argument a reduced copy of the map of the yard exhibited to Mr. Cable three months before the contract was concluded. Nothing is said as to the intention of the parties to make large joint expenditures in improving the "situation and condition;" as to such expenditures made after the contract was signed to the amount of $104,000, or as to the map in the record showing the results of such expenditures, in a very much enlarged capacity. Possibly these omissions resulted from "an excess of candor."

Deft.'s Arg., p. 41.

"4. *The use contended for by the complainant would effect an inequality between the two companies.*"

This is good—very good. "Inequality" is evidently the especial abhorrence of the defendant. The complainant pays for fifty per cent. of the capacity of the yard, and seven and one-half per cent. of the expense of maintenance and joint operation, and has ten per cent. of the use. The forty per cent. of use for which complainant pays but does not receive is enjoyed by this defendant. And it cannot in any degree forego this enjoyment, because it might "effect an inequality between the two companies."[1]

Complt.'s Arg., pp. 58-62.

Deft.'s Arg., p. 42.

"5. *The large expenditures on main line which the contract required of the defendant are inconsistent with the complainant's contention.*"

[1] The testimony of Burns, copied on page 41 of defendant's argument, is printed *verbatim* on pages 105 and 106 of the abstract.

In the discussion of this the learned counsel say: DENVER TERMINALS.

"Under the method which the complainant contends for, it gets the benefit of this now valuable service without contributing any corresponding proportion of the cost thereof."

1. The large expenditures made on the main line, were expenditures which the defendant ought to have made if this contract had never been entered into; and they were necessary to make the property covered by the lease worth $3,000,000.

2. We have already shown that while paying interest upon fifty per cent. of the value of these terminals and seven and one-half per cent. of the expense of maintenance and operation we get ten per cent. of the use. In Pueblo we pay interest upon fifty per cent. of the value, and twelve and one-half per cent. of the cost of maintenance and operation and have four and three-fourths per cent. of the use. These facts are stated in the opening argument for complainant, and are virtually admitted by the defendant's counsel, who gravely assure the court that we are not "contributing any corresponding proportion of the cost" of the facilities shared.

Complt.'s Arg., pp. 55-62.

Deft.'s Arg., p. 46.

"6. *Complainant's contention is not aided by the fact "that the Chicago Company pays interest on one-half the "value of the property.*" Deft.'s Arg., p. 45.

It is asserted under this subordinate proposition, as it was in the opinion of the court below, that the complainant secures the use of this railway by "paying interest "upon one-half of what an independent line would have "cost," that its own line to Denver and Pueblo would have "cost double the price it pays the defendant for the "use of its line." All of this is answered in complainant's original argument.

Deft.'s Arg., p. 46.

Complt.'s Arg., pp. 68-70.

"7. *The complainant was not admitted to the use of "Denver terminals for business brought over the Union "Pacific tracks as being entitled thereto under the contract, "but was admitted temporarily under an outside agreement "upon its distinct promise to pay.*" Deft.'s Arg., p. 47.

DENVER TERMINALS.
Abst., p. 15.

It is true that defendant did dispute from the beginning complainant's right to use the Denver terminals for traffic carried over the tracks of the Union Pacific — it is not true that it was ever admitted by an outside agreement "upon its distinct promise to pay." The promise was to pay for services "not covered by the contract" — this, and nothing more.[1]

Def.'s Arg., p. 48.

"8. *There is no inconsistency in the decree.*"

Inconsistency in decree.

Under this subordinate proposition the learned counsel reply to the comments made in the opening argument as to the inconsistency between some of the provisions of the decree. In this reply it is said:

> "If the *Union Pacific* hauled their cars to or from Denver *it* would receive or deliver over a transfer track, but *it* would not have the right to 'make up' and 'break up' *its* trains in the defendant's yards, or to load or unload at its freight houses, or to receive or deliver goods at warehouses, coal-yards, stone-yards, etc., reached by spurs or sidings from defendant's terminals."

Has any one asserted that *the Union Pacific* could do any of these? There is certainly no such contention in the opening argument. The decree secures to *the complainant* the right to receive and deliver traffic from and to "other railroads," which includes the Union Pacific; and to handle the same, "*to the same extent and as fully* "*in all respects as the defendant may perform like services* "*for itself, and have like use of the joint property for that* "*purpose.*" Concede that traffic is received and delivered over a transfer track — if the defendant may receive traffic on such track from the Union Pacific, may not the complainant do the same? If the defendant may "make "up" a train in that yard for delivery to the Union Pacific on the transfer track, may not the complainant make up a like train in the same yard and deliver it at the same place? If the defendant may "break up" a train received from the Union Pacific in the same yard may not the defendant do likewise? If the defendant can "load

Decree
Abst., pp. 23, 24.

[1] The copy of the correspondence between Smith and Cable is in the abstract, at page 15.

"and unload" at the freight-houses therein trains to be delivered to or which have been received from the Union Pacific, will it be asserted that the complainant may not, under this decree, load and unload similar trains at the same warehouses? The decree will not permit the complainant to handle in the Denver yard any traffic which it hauls over the tracks of the Union Pacific from Limon to Denver; but it may handle the same traffic in the same yard, as it could be handled by the defendant itself, if it is hauled from Limon to Denver by Union Pacific engines.

DENVER TERMINALS.
Inconsistency in decree.

"9. *The plaintiff's contention is not aided by any considerations of public policy.*"

Deft.'s Arg., p. 50.

Public Policy.

It is sometimes pleasant to watch the evolution of a legal proposition through a litigation. In the amended answer filed in this cause it was alleged that—

Abst., p. 90.

—"at the time of entering into said contract and during the negotiations preliminary thereto, the said Chicago, Rock Island and Colorado Railroad Company and the parties promoting the same, were considering the question of building directly from the western boundary of the State of Kansas through eastern Colorado to the city of Denver on the one hand, *or* of building directly to the city of Colorado Springs on the other hand, and thence coming to the city of Denver over the tracks of this defendant; and that by the provision in said contract expressed, that the said Chicago, Rock Island and Colorado Railway Company should on or before the first day of April, 1888, notify the Denver Company (this defendant) whether *or not it elected to build its said line to Colorado Springs, and that if it should not so elect, that the said contract should be null and void*—was meant and intended that *said Chicago Company should* ELECT AS BETWEEN THE SAID TWO ROUTES, AND THAT SAID CONTRACT SHOULD BECOME EFFECTUAL AND OPERATIVE ONLY UPON THE SELECTION OF SAID ROUTE VIA COLORADO SPRINGS, TO THE EXCLUSION OF SAID ROUTE DIRECT FROM THE WESTERN BOUNDARY OF THE STATE OF KANSAS TO THE CITY OF DENVER."

This pleading bears the names appended to the argument for defendant in this court. The affidavit of one of the learned counsel was filed on the hearing, and is now in the record. In this he stated:

Abst., p. 99.

"That he always understood, and in the conversations with said Cable and was always led to believe, that if the said contract

DENVER TERMINALS.

proposed was entered into, *then and in such case the building of other lines than the line to Colorado Springs would be abandoned.*"[1]

On page 30 of this argument, it is thus stated:

"The situation then of the parties was this: That the Chicago Company had determined to build and was building westwardly in Colorado. A question was under consideration as to the route which they should choose in the further building to the west. *It was not a question whether they should build at all,* BUT AS TO THE ROUTE THEY SHOULD CHOOSE."

Again, on page 33:

"It is not the *building* of *a railroad*, or *one of its lines to Colorado Springs*, but it is *the election* of a route for its railway, and the route for *its railway* is to Colorado Springs."

On page 50 of the same argument, counsel are compelled to consider this alleged arrangement with regard to public policy. They then tell us that:

"The Chicago Company was to build to Colorado Springs. The contract was made *because* the road was going to that point. Having concluded to build to Colorado Springs as its objective point, it was competent for it to agree that in consideration of the lease of defendant's line, it would, among other things, carry its Denver traffic over the line so leased. The contract being based on this proposition, that the Chicago Company would connect at Colorado Springs, that company could not divert its traffic elsewhere; and the Rock Island Company, upon leasing the Chicago Company's line, was bound morally, if not legally, to utilize that line in the same manner and to the full measure required of the Chicago Company under the contract."

At last, after thirty pages of the argument were printed, the learned counsel abandon the theory of an election *between the two lines and an agreement to abandon one of them.* It has been discovered that the question *was* "whether they should build at all" and not "as to "the route they should choose." Now, the contract was made "*because* the road was going to Colorado Springs." That was settled before the contract was made. The Chicago Company had respected its obligation to the sovereign by retaining power to execute its declared purpose to build a branch from some point on its main line to Denver; but had in an innocent way agreed that if this

[1] The testimony upon this issue will be found in the "so-called abstract," pages 95–104. No reference is made to any testimony in defendant's argument.

DENVER TERMINALS. *Public Policy.*

branch should be built, it should have no traffic! A contract to refrain from building or acquiring a line from Limon to Denver might be in contravention of public policy: but an agreement to carry no traffic over the line after it was constructed or acquired would be in entire harmony with such policy!

In this connection we are assured that the lease by the Union Pacific Railway Company of the right to use its track from Limon to Denver was

—"prohibited, not only by principles of public policy, but by express statute. * * * That was a competing line. The Statute of Colorado permits a lease only of lines which are *continuous* and connected and not competing or parallel." Dett.'s Arg., pp. 50-51.

In its amended answer the defendant alleged that

—"the said line from Limon to Denver was and is a competing line with the line of the complainant company *to and from Denver to the Missouri river by way of Colorado Springs.*" Abst., p. 90.

It is not necessary to spend time with a discussion of the question as to whether such interstate competing lines are within the prohibition of the statute. The Union Pacific and Rock Island are competing lines as to interstate traffic—the line of the Rock Island being sixty-four miles the longer, and having grades of seventy-five feet in the mile. The Union Pacific grants to it, not the exclusive use of its tracks from Limon to Denver, but the right to operate trains thereover. Each party fixes its own rates and manages its own business without any interference by the other. We are gravely told that this arrangement which placed the parties more nearly upon an equal footing, without restricting the action of either, is void as against public policy and the statute.

The suggestion that the Rock Island Company cannot become the lessee of a railway in the State of Colorado, because it has not been organized under the laws of an adjoining state, will receive respectful consideration when propounded in a writ of *quo warranto* issued at the instance of the attorney general of that state. It is sufficient now that if the state does not complain, the Denver and Rio Grande Railroad Company cannot.

SHOPS AT BURNHAM.
Plff.'s Arg., p. 52.

"10. *The well-known relations of terminals to railway "lines are inconsistent with complainant's contention.*"

In reply to plaintiff's illustration we remark, that when the defendant leases the right to use the Rock Island line including terminals, from Wyanet to Chicago, and pays two and one-half per cent. of the value as rental, and shares in cost of maintenance and joint operation upon the basis of wheelage, there will be no "cry of indigna-"tion" if it limits its use to the Chicago terminals alone—surely none if the rental reserved pays, as it would at Denver, twenty per cent. per annum upon the value of the terminals used, while the lessee would have but ten per cent. of the use.

The court will observe that the main proposition is divided into ten subordinate, and the second of these is again divided into eleven sub-subordinate propositions. In the discussion of which one of these is it made to appear that in "unambiguous language" exceptions are stated to the demise made by the clear and certain language of Section 1, Article 1 of the contract?

II.

Def't's Arg., p. 53.

"THE WORDS 'SHOPS AT BURNHAM' INCLUDE ALL LAND AND IMPROVEMENTS SITUATED WEST OF DEFENDANT'S MAIN LINE, EXTENDING FROM THE NORTH LINE OF THE 'BURLINGAME TRACT' SOUTHERLY TO VASQUEZ STREET."

In the opening argument this issue was stated by the complainant as follows:

Complt. Arg.' pp. 8-34.

—"the plaintiff insists that the phrase, 'excluding the shops at Burnham,' excluded only buildings and other structures, and the land on which they are situated, used exclusively in manufacturing and repairing railway appliances."

Definition.

Witnesses were examined and cross-examined as to the meaning of the term "railroad shops," and a majority of those examined defined the term as stated in complain-

ant's contention. We hope the court will apprehend our proposition more clearly than the learned counsel for the defendant seem to have done. Let it be understood that we claim the right, under this contract, to use all of the property of defendant at and between Denver and Pueblo as it is used by the defendant, excepting only that at Burnham used exclusively in manufacturing and repairing railway appliances. If there are any tracks used by the defendant for operating purposes the complainant has the right to subject them to the same use. If there are any used by defendant for both operating and shop purposes, we have the right to apply them to the same operating uses, and would have the right to use them for shop purposes, as we use the shop tracks at Pueblo, but for this reservation. If there are any that are used by defendant *exclusively* for shop purposes, we cannot use them because of this reservation. SHOPS AT BURNHAM.

The argument of defendant considers this general proposition under eleven subordinate propositions which are again sub-subdivided. These will be noted in their order:

"1. *Even if the excepting clause be disregarded; yet "the grant did not by its terms convey any interest in the "twenty acre (the Bailey) tract or the 'Burlingame "tract.'"* Deft.'s Arg. p. 55.

"(*a*) *No lands were granted.*"

This subordinate proposition is solemnly maintained by an effort to convince the court that a lease of "all and "every portion of its railway and appurtenant prop- "erty between and at" Denver and Pueblo, did not operate to demise any real estate or land, while it did demise the land on which the tracks and stations were located. Concisely stated it means that no real estate or land was demised, but the land on which the track and buildings were located was demised.

"(*b*) *The lands in controversy are not appurtenant to "the property granted.*" Deft.'s Arg., p. 57.

SHOPS AT BURNHAM. *Appurtenances.*

It is argued that these formed no part of the "railway "and appurtenant property," because in the description, the "tracks, buildings, stations, sidings and switches on "and along the line of railway" was enlarged to embrace "all of the railroad and appurtenant property."

Deft.'s Arg., p. 57

It is said, "if we take the word 'railway' used in the "interpretation clause, even if unrestricted by the pre-"ceding particulars. Yet it could not cover land at the "time unoccupied by the railway."

The shops themselves were appurtenant of the railway. But for the exception they would have passed by the description, as it is conceded the shops at Pueblo did. If any of these lands were appurtenance to the shops, they were appurtenant to an appurtenance to the railway. The shops were reserved without appurtenances—all of the appurtenances remaining with the property demised. If the lands were appurtenant to an appurtenance to the railway, which is "more worthy" than the railway itself, the refined distinction in which the learned counsel indulge, may be entitled to some consideration.

When this proposition is accorded a place in the law, lands outside of the space occupied by tracks and buildings, including shop buildings, and the approaches thereto, will form no part of a railway or of the appurtenances thereto, because not actually used as a part of the railway, while lands adjacent to such shop buildings, but not used for shop purposes, acquired for, become appurtenant to the shops and not to the railway, of which the shops are a part—for the lucid reason that the shops as appurtenant to the railway are "more worthy" than the principal thing. Lands cannot become appurtenant to lands, but may become appurtenant to an appurtenance.

Lands part of railroad.

But aside from all this, will this defendant be heard to say that these lands do not form a part of its railway "be-"tween Denver and Pueblo"? By what authority did they acquire them if they were not to be incorporated into its railway? The statutes of Colorado are clear and

explicit as to the powers of corporations in this regard. They

SHOPS AT BURNHAM.
Lands part of railroad.

—"may own, possess and enjoy so much real and personal estate as shall be *necessary for the transaction of their business*, whether acquired by purchase, grant, demise, gift or otherwise; and may from time to time sell and dispose of the same, or any part thereof, when not required for the use of the corporation."

Gen. Stat. Colo., Chap. XIX, § 240, reprinted in the appendix.

The common law is quite as explicit:

"A corporation has implied authority, in the absence of a prohibition in its charter, to acquire and hold any property, whether real or personal, *which may be required for carrying on the business for which the company was formed*. This implied authority extends not merely to the acquisition of such property as is absolutely necessary in carrying on the company's business; a corporation may acquire and hold whatever property is reasonably useful and convenient in attaining its legitimate ends."

Mor. Corp. (2d Ed'), § 327.

"The implied right of a corporation to acquire and hold property is merely incidental to the special business or enterprise for which the company was formed. A corporation has no right to purchase land or any other property for any purpose which is outside of the business indicated by its charter."

If this property is acquired and is held within the corporate powers of the company it is a part of their railway.

In construing a contract like this, no narrow, technical construction will be permitted to override the manifest intention of the parties.

"2. *Defendant's maps submitted to the Chicago Com-*
"*pany show that these lands were included in the excepted*
"*shops.*"

Deft.'s Arg., p. 60.

"(a.) *The shops at Burnham, including all tracks and*
"*facilities there used, were no part of Denver terminals.*"

1. Burnham is in Denver. 2. The tracks and facilities at Burnham were and are used in connection with the yard at Cherry Creek in Denver. 3. There are no facilities at the Cherry Creek yard in Denver for storing, cleaning or supplying cars, either freight or passenger.

Complt.'s Arg., pp. 9-18.

The passenger coaches of both companies upon arriving at Denver are removed to the coach-track in controversy, are there cleaned and supplied, and are then stored until taken out for a return run. All concede

Complt.'s Arg., pp. 28-29.

SHOPS AT BURNHAM. *Cleaning tracks.* Abst., 73, 81-82.

that these are processes in the operation of the railway. The learned counsel argue, and many of their expert witnesses testify, that cleaning tracks and "wye" tracks upon which trains and engines are turned in the operation of the road, are not terminal facilities. Facilities are "the means by which the performance of any-"thing is rendered more easy; convenience; assistance; "advantage." Tracks upon which cars are cleaned, stored and turned, in the operation of a railway, are operating "facilities." When these are the only means used for the performance of such operations at a terminus of the line, these are "terminal facilities," whether in the yard at Cherry Creek or the yard at Burnham.

Maps. Deft. Arg., p. 61.

The counsel say that the maps sent by Ricker to Parker "were not transmitted as showing 'terminal "'facilities,' but as showing all of the defendant's property "at the places named." Mr. Smith wrote to Mr. Cable on the 10th of December, 1887, that he had met Mr. Parker who requested, "that we would get up a state-"ment showing the *area of our terminal facilities* at "Denver and Pueblo, *which will be done at the earliest* "*practicable date.*" On the 21st of the same month, Mr. Ricker, chief engineer, sent maps to Mr. Parker, which he describes as "maps of our *depot grounds* and "property at Denver, Pueblo and Colorado Springs." Among these were two maps of property at Denver—one of the yard at Cherry Creek and the other at Burnham. Mr. Smith testified that he had no doubt the maps were sent for the purposes indicated in his letter. Is it not clear that Mr. Cable had reason to assume that these maps showed the "terminal facilities" at Denver? [1]

Abst., pp. 48, 49.

Abst., p. 57.

Deft.'s Arg., p. 62.

"(*b.*) *The title of the Burnham map is opposed to the* "*plaintiff's contention.*"

In showing what information the title to the map should have imparted, the learned counsel quote liberally from

[1] Compare defendant's statement of the testimony concerning this point with the concise statement which appears in the abstract, pages 48-52.

the testimony of Sample and Smith concerning matters which are not referred to even in the title. We do not care to add to what is said concerning this on pages 17 and 18 of the opening argument. [1]

SHOPS AT BURNHAM.
Valuation.

"3. *The valuation of the granted premises did not in-* Deft.'s Arg., p. 67.
"*clude the shop grounds or any tracks or other improve-*
"*ments thereon.*"

The argument of this proposition rests upon a statement as to a fact which is not sustained by the record. In speaking of the memorandum of valuation produced by general manager Smith, the counsel say:

"But Mr. Smith submits a statement showing the elements Deft.'s Arg., p. 68.
which went to make up the final valuation. *Mr. Cable saw it; it was talked over; it was made at the time; it expressed the final result; it is peculiarly disputed.*"

This proposition shows the abandon with which a record can be handled. Mr. Smith when examined as a witness produced a memorandum in his own handwriting, dated on the day after Mr. Cable left Denver, but which he says he *thinks* Mr. Cable saw. There is no testimony showing that it was talked over, or that it was made at that time. But let us examine the proposition under discussion in the light of this statement. In it Mr. Smith values the "terminal facilities at Denver" at $700,000, while the "terminal facilities at Pueblo" were valued at $200,000. The "facilities" at Pueblo included the shops. That is not disputed. Why did not the same term cover shops at Denver? The "facilities" at Pueblo not only included the shops, but embraced tracks upon which were handled daily an average of 744 cars. After improvements costing $104,000 were added to the Denver "facilities" the tracks would accommodate, *in a block-*

Complt.'s Arg., pp. 58-61.

Abst., pp. 60-61.

[1] The title of the map referred to in defendant's argument and set out as Exhibit D thereto, appears in the abstract map,—the "gross misrepresentation." An extract is made from same deposition, which is concisely stated on pages 81 and 82 of the "so-called abstract." The testimony of General Manager Smith, copied *verbatim* on pages 65 and 66 of the defendant's argument, is fully and fairly stated on pages 55 and 56 of the "so-called abstract." On the following pages of the same abstract will be found additional testimony concerning the same topic, by Smith, Cable and Low.

SHOPS AT BURNHAM. *Valuation.*

ade, 800 cars. Yet it is claimed that these facilities, less the shops and all of the land west of the main line at Burnham were valued *then* at $700,000. It was necessary to expend upon them $104,000 to make them sufficient to accommodate, *in a blockade*, fifty-six cars more than have been handled *daily* in the Pueblo yard. Why was the yard at Denver, less the property at Burnham, worth $500,000 more than the property at Pueblo including the shops?

But say the learned counsel:

Deft.'s Arg., p. 69.

"The main line *passing by* Burnham is included in the '120 miles of railroad at $18,000,' for this is measured from end to end of the demised premises"—

Terminal facilities—Denver—Pueblo.

Which is quite true, but it is just as true of the yards at Pueblo as of those at Denver. The "120 miles" *passes by* both yards at Denver to a connection with the Union Pacific Railway north of Cherry Creek, and by the yards and shops at Pueblo to South Pueblo. But the learned counsel continue:

—"but none of the grounds or improvements constituting Burnham shops as above defined as listed here, unless covered by the words 'terminal facilities, Denver.' What are the terminal facilities at Denver?"

And what are "terminal facilities at Pueblo?" It is conceded that these embrace "the grounds or improve-"ments constituting the" Pueblo shops. We invoke Webster and Worcester, and all of the learned editors of the Century Dictionary, in support of the proposition, that if "terminal facilities, Pueblo," embraces the "grounds "or improvements constituting" Pueblo shops, "termi-"nal facilities, Denver," embraces the grounds or improvements constituting the Burnham shops *which are in Denver*.

But it is also said:

Valuation.
Deft.'s Arg., p. 71.

"Mr. Smith testifies that the valuation did not include any portion of the property which defendant claims to be included in the words 'its shops at Burnham;' but that on the contrary this property was especially excluded."

Abst., pp. 58, 59.

To which Mr. Cable responds that, the "statement is

"false without limitation or qualification;" and "that no "hints or suggestions, or assertion to the effect that any "of the lands situated at Burnham, and not so actually "occupied by said shops and tracks, formed any part of, "or were included in Burnham shops." And Mr. Cable is corroborated by Mr. Low, who was present.[1]

SHOPS AT BURNHAM. *Main tracks on maps.*

"**4.** *The designation 'main tracks,' on the map of the 'shops at Burnham' does not aid the appellant.*" Deft.'s Arg., p. 71.

One page is devoted to the discussion of this proposition, and the discussion consists of assertions mainly. "It "will be observed," it is said, "that they are tracks "marked on the map *of the shops*." Over a mile of the "main line" was marked on the same map. Was it a shop track because this map was inaccurately named? And the counsel add: "Even counsel for appellant has "not the courage to express in words the conclusions to "which he would try to drive us, to wit: that they are a part "of the main line of railway." We suspect that counsel misapprehend the drift of our argument—for a purpose. The thought had never occurred to us that these "main "tracks" are a part of the main *line*, which consists of a track or tracks extending from one terminus of the railway to the other. A main track is one from which side and spur tracks spring. It has a place in the system of operating tracks between the main line and the side and spur tracks. Neither are counsel accurate in their statement of the uses of these tracks. Main track A is not used solely for the deposit of material. It is the track upon which cars are placed when delivered by the machinery department to the operating department.

Complt.'s Arg., pp. 17-18.

Abst., p. 50 *et seq.*

Sample's dep., Abst., p. 81.

"**5.** *Defendant's tax returns do not aid appellant.*" *Tax returns.* Deft.'s Arg., p. 72.

Defendant's argument attempts to weaken the force of the effect of the returns made for taxation by an admission that all tracks were returned to the state board for assessment, as were all lands upon which tracks are sit-

[1] The testimony of Mr. Dickenson defining the word "terminal, as we understand it in this case," is *not* stated in the abstract.

SHOPS AT BURNHAM.
Tax returns.

uated. It is said that this was done "for the very good "reason that under the law cited by appellant, all track-"age, wherever situated and however used, is by the "state board required to be returned to it and not to the "local assessor." The act referred to is printed in the appendix to our opening argument, commencing on page 89. It declares that the duties of the State Board of Equalization

Complt. Arg. App., p. 89.

—"shall be to assess all the property in this state belonging to railway corporations, *except lots or parcels of real estate owned by the road within each county, and improvements thereon, and except depots*, MACHINE SHOPS, AND OTHER IMPROVED PROPERTY CONNECTED *with said road and located in any county which shall be taxed in the county where situate.*"

Complt. Arg., pp. 18-20.

It is very clear that the "machine shops" were not to be assessed by the State board and were to be assessed by the county officers. Everything which formed a part of the "shops" was required to be returned to the county assessor. If all of the tracks west of the main line belonged to the shops—were a part of the shops—they should have been so returned. The assessment of the railway, as contradistinguished from the "shops," was to be made by the State board. The act declares, as to property assessed by the State board:

Compl. Arg., p. 90.

"The said property shall be valued at its full cash value, and assessments shall be made upon the entire railway within this state, and shall include the right of way, road-bed, bridges, culverts, rolling stock, depots, station grounds, buildings, and all other property, real and personal, *exclusively used in the operation of said railway.*"

The statute is sharp and clear as to the difference between "machine shops" and property "exclusively "used in the operation of such railway." It is said that "this law does not distinguish between "*operations*" in connection with shops and "*operations*" in connection with terminals or "transportation." The statute negatives the idea of any such classification of "operations." The meaning of the term "operation," when used in connection with a railway is well understood. It consists in the movement of trains over the main lines, main tracks, side-tracks and spurs, and the use of depots and station

houses, in the carriage of persons and property, including all other acts incidental to such movement and use. The portion of the property used in such operation consists in the main of the right of way, road-bed, bridges, culverts, rolling stock, depots, station grounds and buildings. The statute enumerates these, and adds: "All "other property, real and personal, exclusively used in "the *operation* of such railway." This assessment does not cover machine shops, because in the judgment of the legislature they are not *exclusively* used in the operation of the railway. They were assessed by the officers of the county. Tracks which were not used in the operation of the railway, but were *exclusively* used in connection with the shops did constitute a part of the "shops;" were a part of the shops, and should have been returned as such to the county assessing officers.

SHOPS AT BURNHAM. *Tax returns.*

The learned counsel admit that the returns were made as charged, but asserts that they "can throw no light on "the meaning of this contract." We confess that, in our simplicity, we did think that the returns for several years, before and after the contract was made, of these main tracks and of the land under them for assessment as property "*exclusively used in the operation of such railroad*," should be considered as tending to show that the parties, and especially the party who made the return, did not regard these main tracks and the land under them as a part of the machine shops, which should be returned to different officers. We also thought that these returns should be considered in connection with the positive statements of Mr. Cable and Mr. Low, and the maps upon which these several tracks were designated as main tracks. These conclusions have not been changed by this argument.

The remainder of the argument upon this subordinate proposition, consists in mere words, which, if not "sound "and fury," yet "signify nothing." The complainant, say the counsel, is not liable for half of the taxes levied upon the property so returned, because its covenant is to

SHOPS AT BURNHAM.
Tax returns.

pay one-half of the taxes levied upon the "property *used* "*by* the Chicago company under this contract, excluding "shops at Burnham." But the testimony of Smith, Derel, Burns and Pike, all officers of defendant, show that the coal chutes, three or four tracks west of the main line and between it and the Burnham office, the coach tracks and the wye track, "*are used*" by the complainant. We are curious to know how the complainant can escape taxes levied upon property "ex- "clusively used in the operation of the railway." The state board transmits to the county "a statement showing "the length of the main track of such railway within the "county, and the assessed value per mile of the same as "fixed by a *pro rata* distribution per mile of the assessed "value of the whole property," and this is entered upon the books for taxation. If under the name of "main "track" several acres of excepted shop property have been included in the assessment, how will it be eliminated?[1]

Proposed yard.
Deft's Arg., p. 74.

"**6.** *The map of 'proposed yard,' near Burnham does "not aid the appellant.*"

This matter is argued by the learned counsel solely on the testimony of Mr. Smith, the general manager of the defendant. In the opening argument, we showed not only that Mr. Smith's statements were uncertain and unreliable,

Compl's Arg., pp. 21-22.

but that he was positively contradicted by Mr. Cable and Mr. Low, who are corroborated by the map which Ricker sent to Parker. From Mr. Smith's testimony a digression is made into the territory of Mr. Smith's authority.[2]

Abstract, pp. 62-65.

This map was introduced for the purpose of showing

[1] The stipulation as to the payment of taxes, printed in the record at p. 1153, is copied *verbatim* in defendant's argument, and is concisely stated on page 66 of the abstract. The accuracy of this statement is challenged by the defendant's counsel, who say that it does not state "the amount paid, the property on which it was paid, or the basis on which it was estimated." The stipulation shows that it paid the taxes "for the year 1888," assessed upon the property covered by the contract,—the property used in the operation of the railway—and the returns show what property was so assessed.

[2] We ask the court to compare the statement of Mr. Smith's testimony, on pages 75 to 77 of defendant's argument, with the statement thereof in the "so-called abstract," pages 62 to 65.

SHOPS AT BURNHAM.

that when the contract was made the parties understood that the Bailey tract and land north of it was not embraced in the reservation of the "shops at Burnham," a purpose which the learned counsel persistently refuse to discover.

It is in the discussion of this subordinate proposition that the learned counsel give expression to "an emphatic protest "against the so-called abstract of record filed by appellant "in this case." This glowing indignation becomes lurid when the map is contemplated. We have elsewhere noticed the several like ebullitions which embellish this argument. It is only necessary to add now that the map which has so excited the indignation of the learned counsel is a fair and honest abstract of three maps—in the record. It presents no word or line which is not in some one or more of the three. Mr. Smith presented a blue print of a tracing which was made in 1884. On this he drew an "off-hand line with a red pencil," and the print so marked went into the testimony as "Smith's Exhibit No. 20." Mr. Cable presented a map *the basis of which was a like blue print of the same tracing:* but on this boundary lines of the property owned by defendant at Burnham were marked red, and on it was indorsed a legend containing a list of several tracts, showing the area of each. This went into the testimony as "Cable's Exhibit No. 2." In making the abstract map, the red lines and the legend on the Cable map were drawn on the Smith map. The map thus produced was Smith's map with the red property lines in red, or the Cable map with the "off-hand "line" in green. A map of the "yard proposed," produced by Middleton, is in evidence. The outlines of the yard are also endorsed on the abstract of the Smith and Cable maps. They did not show each track, but did show the outlines of the proposed yard.

The trouble with the learned counsel is, not that this map is "a gross misrepresentation," but that it lays upon the same flat surface Smith's off-hand line, which he says he showed to Cable as to the eastern boundary of the shops

SHOPS AT BURNHAM. *Perversions of testimony.*

at Burnham; the lines and areas shown on the map sent by Ricker to Parker by Smith's order, and the operating yard which Smith and Cable agreed shou'd be constructed at joint expense upon territory, a large portion of which it is now pretended was embraced in the exception of the shops at Burnham.

Deft's Arg., p. 78.

"7. *The map produced by Mr. Wolcott at Chicago "does not aid the plaintiff's contention.*"

This subordinate proposition seems to have been introduced into the argument for the purpose of displaying, "another perversion of the testimony in the abstract of "record prepared by plaintiff." The alleged perversion consisted in incorporating in the abstract the following:

Abstract, p. 49.

"At the interview between Mr. Wolcott and Mr. Withrow, at Chicago, about the 19th of December, Mr. Wolcott produced a map showing the property at Burnham, and said to Mr. Cable that he assumed that we would not want to use their shops, and that they would want to reserve the shops for their own use. He called Mr. Cable's attention only to the structures which were indicated on the map, without pointing out any ground adjacent to the shops."

This additional perversion of the testimony consists in three particulars, and in three only: 1. The counsel who prepared the abstracts placed against the paragraph quoted the following marginal note: "Cable's Afft.: record, 609; fol. 1,910." This reference points to the page of the record on which Mr. Cable's *deposition* was printed—his affidavit being printed on another page. But we are told that Mr. Wolcott's affidavit was in response to Mr. Cable's affidavit. The deposition had been taken when Wolcott's affidavit was made. If the deposition was untrue the defendants had ample opportunity to contradict it by Wolcott's affidavit. 2. When Mr. Cable testified, the cross-examiner used the words "shop-"buildings," and in the answer Mr. Cable used the word "shops"—and neither used the word "structures." Mr. Cable did testify that no officer of the Denver Company "pointed out any ground adjacent to the shops for the "purpose of indicating that they were excluded in the

"description of the shops at Burnham." The "perversion" consisted in substituting the word "*structures*" for "*shop-buildings*" or "*shops*." The exceeding gravity of this perversion will be made manifest by some of Webster's definitions: "BUILDING. * * * 2. A *structure*, "an edifice"; "SHOP. * * * 2. A room or *building* in "which mechanics work; a work-shop"; "STRUCTURE. * * * 3. A *building*; an *erection*; edifice; fabric." The Century Dictionary defines: "BUILDING. * * * 2. A "fabric, built or constructed; *a structure*; an edifice; "as commonly understood, a house for residence, business or public use, or for shelter of animals or storage "of goods. In law, anything erected by art, and fixed "upon or in the soil, composed of different pieces connected together, and designed for permanent use in the "position in which it is so fixed, as a *building*;" "STRUCTURE. * * * That which is built or constructed; "an edifice *or building* of any kind; in the widest sense, "any production of pieces of work artificailly built up, or "composed of parts joined together in some definite "manner, any construction;" SHOP. A room *or building* "in which the making, producing or repairing any article "is carried on; or in which any industry is pursued, as a "machine shop; a repair shop, a barber shop, a carpenter "shop." "Structures" and "shops" are "buildings;" a "railroad shop" is a "structure." This "perversion" was not discovered when the abstract was prepared, because it lurked in a synonym.

SHOPS AT BURNHAM. *Perversions of testimony.*

"8. *The location of the 'wye' at Burnham does not "affect the question.*" Wye track. Deft's Arg., p. 81.

The learned counsel presents the "theory" upon which a supplemental agreement in regard to this track was made, and then, unfortunately for the "theory" set out the supplemental contract itself. This is the agreement: Compl. Ar. p. 29.

"It was agreed to add the cost of construction of the Burnham Wye to original valuation, on which the Rock Island will pay the regular rate of interest from November, 1888, this not to include value of land on which the wye is located. The bills Defts. Arg., p. 80.

SHOPS AT BURNHAM. *Wye track.*

rendered for turning trains shall be cancelled in view of the above, and that this statement is made without prejudice to the question as to whether the land on which the wye is located is joint property or not." [1]

There is not in this contract any provision that this wye track shall "be used as joint property until a substitute" is "given at some other convenient place." The only thing reserved was "the value of the land on "which the wye is located." The proposed trade of one track for another is first found in this fourth division of the decree of the Circuit court—

Abstract, p. 24.

"—the complainant shall not be excluded from the use of the wye track at Burnham for the turning of its engines, cars and trains so long as it shall continue to pay for the use thereof, interest at the rate of two and one-half per centum per annum on the cost of construction, unless and until the defendant shall provide at Denver another wye track for the turning of such engines, cars and trains."

Here was a considerable body of land in actual use for *operating* purposes, and for no other. The cost of constructing this track was added to the $3,000,000, upon which complainant pays two and one-half per cent. No provision is made in the original or supplemental contract for a compulsory exchange of this track for such other as the defendant might be pleased to furnish, yet such compulsory exchange is provided for by the decree.

Coach tracks.

"9. *The coach track belongs to the shops.*"

Deft's Arg., p. 82.

On this track are the only "facilities" on defendants property in the city of Denver for cleaning coaches. The testimony shows that before the contract was entered into, defendant cleaned and stored its own coaches between arrival and departure on this track. After complainant entered under the lease, the coaches of both companies were there cleaned and stored. Such cleaning and storing is a part of the "operation" of a railway.

See page 30 above, and page 46 below.

[1] This agreement is not in the abstract presented by complainant.

"10. *The meaning of the word 'shops' supports the "defendant's contention."*[1]

SHOPS AT BURNHAM.

Definition.

The views of Hawksworth as to the difference between the reservation of a house in demising, a farm, and a reservation of a shop in demising a railroad, are not printed in the abstract.

Deft's Arg., p. 81. See subordinate proposition 7, pp. 38 and 39.

Hawksworth expressed the opinion that in the sale of a farm, reserving a house would except the house without any land, but a sale of a railroad "with the reservation of a shop carries with it "a large body of land." The learned counsel suggest that "the court below seem to "have had the same opinion, and very decidedly agreed "with this witness." It may be, but the proposition is, nevertheless, enveloped in mist. The court distinguished, not between the reservation of a farm house and of a railroad shop, but between "a shoe or tailor shop" and a railroad shop; the distinction consisting in the fact that a shoe shop has a roof over it, and "by far the greater portion of all principal railroad shops * * * are without a covering." The shop in each case is a building or structure, and whether roofed or roofless would be excepted by a reservation of the shop. As to this there should be no controversy. Many there are, however, who will not be

Deft.'s Arg., p. 83.

---

[1] The learned counsel for defendant say:

"The testimony is conflicting. The appellant in that part of the argument denominated an 'abstract of record' have set forth by quotations various definitions given by its own witnesses. We call attention to a few definitions given by witnesses for defendant."

The innuendo is that, "in the argument denominated an 'abstract' we stated *only* the definitions given by complainant's witnesses. If the court will take the trouble to look into the abstract it will find that pages 71 to 84, with a portion of page 70, are devoted to the definitions of defendant's witnesses, Burns, Campbell, Denby, Deed, Hawksworth, Palmer, Pike, Sample and Smith." Not only is the evidence of Burns copied on page 83 of defendant's argument concisely and fairly stated, (pages 70 and 71) but additional testimony of the same witness concerning the same topic appears in connection with it. The definitions of Hawksworth copied on page 82 of the argument appears on page 77 of the abstract, in connection with additional testimony by the same witness. The definition of Palmer, printed on page 84 of the argument will be found on pages 77 and 78 of the abstract. The definition of Campbell, on page 84 of the argument is printed on pages 73 and 74 of the abstract. Smith's, printed on the same page of the argument, appears on pages 82 and 83 of the abstract.

The views of Hawksworth as to the difference between the reservation of a house in demising a farm, and a reservation of a shop in demising a railroad, are not printed in the abstract.

SHOPS AT BURNHAM. *Situation.*

able to perceive clearly why a "large body of land" adjacent to a shop is included with it because the *structure* has no roof.

Def't's Arg., p. 55.

"11. *The situation of the defendant and its property at "the time of making the contract shows that the entire "grounds at Burnham, west of the main line, were ex-"cluded from the contract.*"

The argument upon this subordinate proposition is—the Denver Company did not make the contract claimed, *because* it was not such a contract as it should have made!

This branch of the argument for defendant is more remarkable for what it does not than for what it does contain. It should be remembered that the main proposition is: "The words, shops at Burnham, include all lands "and improvements situated west of defendant's main "line, extending from the north line of the Burlingame "tract, southerly to Vasquez street." The subordinate propositions are constructed and arranged solely with a view to the support of this. A number of material considerations affecting this main proposition, presented in the opening argument for the complainant, the learned counsel for the defendant, with characteristic adroitness, have succeeded in avoiding as they would have avoided deadly serpents. It may be profitable to recall some of them:

Property west of main line.
Compl't's Arg., p. 29.

1. No witness has testified that either the shops at Burnham, or the shop grounds at Burnham embraced *all* of the property west of any main-line. Smith, the general manager, the officer of the Denver company who conducted the negotiations with Cable, did not fix the boundary so far east as any main-line then or now existing. He said that he made an "off-hand line with a "red pencil," as the eastern boundary of the shops property. This line appears on Smith's Exhibit No. 20, and is the green line on the abstract map—the "gross "misrepresentation"—appended to complainant's abstract. It is west of the main line. This line was abandoned as

Abstract, p. 23-24.

an eastern boundary for two reasons: (1.) Smith said it "was not a well-defined line; it was just off-hand, with- "any rule or idea of making any line clear across." This would make an unsatisfactory boundary. (2.) The court below, by the decree appealed from, fixed the boundary in this wise: The words, "shops at Burnham" are adjudged to "include all lands *used or procured for* "*shop purposes and appurtenant to the shops* located at "Burnham, *on the west side of defendant's main line of* "*railway*, bounded on the north by the north line of the "parcel of land known as the Burlingame tract, and on "the south by the north line of the parcel of land known "as the Bailey tract (being the north line of Vasquez "street.)" It did not embrace all lands owned by the defendant "on the west side of the main line of railway" —the lands claimed by defendant's main proposition. It was limited to those "used or procured for shop pur- "poses and appurtenant to the shops." The attention of court and counsel was called to this in the opening argument. The omission to even attempt an answer is at least suggestive.

SHOPS AT BURNHAM. *Property west of main line.*

2. The coal chutes are west of the main line and between the north and south boundaries referred to. They are "fa- "cilities" for coaling engines engaged in the operation of the demised railway. The defendant in its amended answer on file, admits that these chutes were reconstructed, *the cost thereof capitalized, and that complainant pays interest on such capitalized cost as it pays upon the other demised property*. This was discussed in the opening argument, but no answer is attempted in defendant's argument.

Coal chutes. Compl. Arg., p. 31.

Abstract, pp. 47 and 48.

3. Between the main line and the office at Burnham, a part of the "shops" as defined by complainant's counsel, are three or four tracks used exclusively for operating purposes *by both of the parties*. So testified Smith, defendant's general manager, Burns, superintendent of transportation, Deuel, superintendent of division, and Pike, the general manager's secretary. The tracks were

Tracks west of main line. Compl's Arg., p. 32.

Abstract, pp. 70, 71, 72 and 76.

COMPLAINANT'S TITLE

not only west of the main line, and between the north and south boundaries, but west of the "off-hand line" drawn by Smith on his Exhibit No. 20. All of this was presented in the opening argument without eliciting any response in the defendant's argument.

Which main line?

Compl. Arg., p. 31.

4. When this contract was executed there was but one main line at Burnham. When the decree was entered, there were two. To which do the decree and the argument for defendant refer? Until this is answered there is no fixed boundary. Attention was called to this in the opening argument, but the learned counsel have been even more silent than was the "ominous bird of yore" which croaked one word as it sat "on the pallid bust of "Pallas" above the poet's chamber door.

Abstract, pp. 61 and 84.

III.

Deft's Arg., p. 80. "THE COMPLAINANT HAS NO RIGHTS ON DEFENDANT'S RAILWAY, AS SUCCESSOR IN INTEREST OF THE CHICAGO COMPANY, UNDER THE CONTRACT OF FEBRUARY 15, 1888."

"1. *Complainant had no valid paper title.*"

Deft's Arg., p. 85. "2. *Defendant is not estopped from denying the complainant's title.*"

If these are questions which can be raised by any one other than the States of Colorado and Kansas, or a stockholder in the Chicago Company, they were answered in the opinion of Mr. Justice MILLER, and in complainant's opening argument. They will receive no further attention now.

IV.

"THE COMPLAINANT HAS NO RIGHT UNDER THE CONTRACT TO PUT INTO THE DENVER TERMINALS ITS OWN SWITCHING ENGINES, SWITCHING CREWS AND OTHER EMPLOYES DEVOTED TO ITS EXCLUSIVE SERVICE." OPERATION OF YARDS. Deft's Arg., p. 101.

"1. *The contract does not contemplate such separate "service.*"

"2. *The prior declarations of the parties agreed with defendant's construction of the contract.*" Deft's Arg., p. 102.

"3. *Separate service is impracticable in the Denver yard.*"[1] Deft's Arg., p. 112.

"4. *The defendant is not estopped by any past construction given to the contract, especially as to the Denver "yard.*"

It is not necessary to add anything to what is said in the opening argument concerning the first three subordinate propositions. The fourth should receive a passing notice. The letter referred to is presented in the "so-"called abstract" and is considered in the opening argument. It was written by General Manager Smith, "after "consulting general counsel" Hon. Edward O. Wolcott or his representative Joel F. Vaile, Esq. In that letter the contract was construed. Their construction was acquiesced in by all of the parties until this controversy arose, and was adopted by the court below. The learned gentlemen now assail the construction placed upon the con- Abstract, p. 14.

---

[1] On pages 105 to 112 the defendant's counsel quote from the testimony of witnesses who were of opinion that the operation of a yard by the employes of two companies, under the supervision of one officer, was impracticable. The testimony of Mr. Deuel, printed on pages 106 and 107 of the defendant's argument, will be found on pages 125 and 126 of the abstract; the testimony of Burns, on page 108 of the argument, will be found on page 125 of the abstract; the testimony of Palmer, printed on page 109 of the argument, may be found on pages 126 and 127 of the abstract; the testimony of Campbell, printed on page 109 of the argument, will be found on page 128 of the abstract; the testimony of Choate, printed on page 109 of the argument, will be found on page 129 of the abstract; the testimony of Derby, printed on page 110 of the argument, may be found on pages 129 and 130 of the abstract.

tract by the defendant's general manager in accordance with their own advice.

Deft's Arg., p. 113. "5. *Traffic must be handled at Denver terminals by "joint employes.*"

We do not care to reply as to this.

V.

CLEANING TRACKS. Deft.'s Arg., p. 114. "THE DENVER COMPANY IS NOT BOUND BY THE CON-"TRACT TO FURNISH FACILITIES FOR CLEANING "DEFENDANT'S CARS."

To which we reply, if there were any "facilities" anywhere on the line between and including Denver and Pueblo for cleaning cars, the complainant is entitled to the "full, equal and joint possession and use" of the same, with defendant. A track conveniently located and equipped with pipes for supplying water is such a "facil-"ity." As such it has been used by both the parties. It is not only a convenience, but a necessity in the operation of a railway. This was recognized by the court below, in the order in the decree which directed "that the par-"ties shall set apart a track at Denver on which the "complainant shall have the right to clean its cars; and "that if no existing track can be conveniently devoted to "that purpose, the defendant shall construct and equip "a track therefor, at the joint expense of the parties, "plaintiff and defendant."

See page 30 above.

Abst., p. 24.

The only conceivable justification of the order requiring the setting apart of such a track, for the construction of a new one at joint expense, can be found in the fact that the decree excluded complainant from a track which it had a right to use under the lease.

But the learned counsel say that the subject "of car "cleaning was entirely outside of the contract," as caring for engines would have been but for a special provision. If counsel mean by this the *process*, the application of the

brushes and water to the surface of the cars—the proposition is not disputed. If they mean that "facilities" there existing for such cleaning were excluded, the proposition is disputed. When complainant's engines are detached from the trains on arrival they are "housed"—taken by defendant's employes to the engine houses, where they receive the attention of the hostlers until returned to the trains. For this service defendant is entitled and receives compensation in addition to the rental paid under the contract. Passenger trains on arrival discharge their passengers and baggage, and are then taken by defendant's employes to the cleaning tracks, where the water and brushes are applied by other employes of defendant, in the process of cleaning. The cars remain standing on these tracks until needed for the return trains, when they are removed to the passenger station. For moving the train and applying the brushes and water the defendant is entitled to and receives additional compensation. It is not entitled to compensation in addition to the rental, for the use of the engine house (unless one is constructed for its especial use), neither is it entitled to additional rental for the use of the track on which the cleaning and storing is done. The complainant may do its own "housing" of engines and moving of trains, its hostlers' work and its own cleaning. It may compel the defendant to do the "housing" and hostlers' work—it cannot compel it to do the cleaning.

CLEANING TRACKS

Abstract, pp. 81 and 82 also 73.

Sample's test., Abst., p. 82
Deuel's test., Abst. p. 76.
Burns' test., Abst. p. 73.

The manner in which the interviews and correspondence between the general managers, Smith and St. John, is disposed of is particularly interesting, especially when considered in connection with the learned counsel's oft-repeated suggestions as to candor. "The gist of the "correspondence" we are told, "*was not as to the place "of cleaning, or as to the use of particular tracks*, but as to "the method and means of doing a service not covered "by the contract." The question was one of abstract "right." It is not the fault of defendant's counsel that this theory is not in accord with the testimony. Mr. St. John in his telegram to Mr. Smith asked:

Def't's Arg., p. 115.

CLEANING TRACKS
Abs. 120, Div. 119-123.

"Do I understand you take the position that we have no right to do the work of car cleaning and the necessary cleaning of our engines *at Burnham*?"

To which Mr. Smith replied:

"If you so elect you have the right, at your own expense, with your own men, and your own tools and appliances, to clean your cars and engines; but you have no right to use our buildings, shops or implements for that purpose, without our consent."

The only place in Denver at which cars were or could be cleaned was on this track at Burnham. Burnham was expressly named in St. John's telegram, and the track was necessarily understood by both parties. Mr. Smith's answer is an admission of the existence of the right to clean cars *at Burnham* on that track. He excludes from the admission the use of the "buildings, shops and implements" of the Denver Company, but does not exclude the track. In a subsequent interview, Smith declared, in substance, that any attempt to put the employes of the Rock Island at the work of cleaning cars *at Burnham* would be resisted by force. Mr. Moffat says that he heard this conversation, and that "Mr. Smith emphatically and directly stated to the said St. John that "he, the said Smith, did contend that the complainant "company had no right to introduce its own employes "*into the Denver yards* for the purpose of cleaning its "coaches." Mr. Smith refused to permit the use of any tracks at Denver, either in or out of the Burnham ground, to be used for car-cleaning by complainant, for which he assigned two reasons: 1. That the ground was not sufficiently ample. 2. That he was unwilling to have two sets of employes working near each other. It is not true as stated in this argument, that this correspondence, or their interview did not have reference "to "the place of cleaning, or as to the use of particular "tracks."

VI.

"THE COMPLAINANT IS NOT ENTITLED TO ANY RELIEF UNDER ITS ALLEGATION REGARDING THE FAILURE OF AGENTS AT WAY-STATIONS TO SELL ROCK ISLAND TICKETS."

DISCHARGE OF EMPLOYES. Deft's Arg., p. 117.

In the opening argument complainants state this issue as follows:

"As to the right to demand absolutely the removal of any employe engaged in the joint operation of the line." Complt. Arg., pp. 83 and 84.

The learned counsel say:

"No such general topic is in issue in this case. The only cognate subject is an allegation in the supplemental bill that certain agents had refused to sell Rock Island tickets at certain way-stations, and that a demand for the removal of these agents, based on this cause, had been disregarded by defendant. This is another case where the candor of the complainant is not such as to win admiration."

This is a bill for the specific performance of a contract. In our pleadings we alleged a refusal upon the part of the defendant to perform its obligations set out in Article III, section 3, and by way of specifications set out special cases in which we had demanded its performance. This was met by allegations to show that the demand was founded on insufficient reasons. When the case was argued, Edward O. Wolcott and Joel F. Vaile presented an additional printed argument, which is on file in the court below. It has not been certified to this court, but as it was printed, we referred to it in the opening argument, and made a quotation from it, knowing that any misstatement or error concerning it, or in quoting from it, could and would be corrected in the argument to be filed by counsel, who seem to be ever ready to charge bad faith. No statement made concerning the "additional argument" is disputed; the quotation from it is unchallenged. We again reproduce it as an answer by Wolcott and Vaile to the statement of the same learned counsel, that "no such topic as this one "now presented is in issue in this case."

DISCHARGE OF EMPLOYES.

"Counsel for complainant insisted in the Denver argument that it was the imperative duty of defendant to immediately discharge any employe on joint tracks upon request by the complainant, whether any reason existed for the request or not, and without reference to the fitness or unfitness of the employe. We do not care to discuss such a proposition. In our opinion section 3 requires that the request should be a *reasonable* request. If this is not its meaning, then any employe on the joint track is at the mercy of the Chicago Company, and all discipline and encouragement towards good service are at an end among the employes on joint track, all of whom are employed by the Denver Company, and who render that company about ninety-three per cent. of their whole service.

So the issue was made and was debated in the court below. But the learned counsel say:

Deft.'s Arg., pp. 117-118.

"When this subject was reached by counsel for defendant, the counsel for complainant suggested in open court that this point would not be insisted upon, and the court thereupon directed the defendant's counsel to pass it by, saying that the court would certainly not consider a point which the complainant itself abandoned. It was because of this abandonment of the claim in open court that no mention is made of the subject in the final decree. As these matters, however, by their very nature do not appear of record, we shall briefly discuss the question as it is presented by the pleadings and the evidence."

That this does "not appear of record" is not its greatest infirmity—*it is in every essential particular untrue.* The court did ask for a statement of the facts as to the agents named in the supplemental bill, and counsel for complainant did state that they asked for no relief *on such facts.* We did insist then, as we insist now, that the mere demand for removal, without any assignment of reason whatever, was sufficient under the contract. The general manager had declared, as the unquestioned testimony shows, that he would make no removals upon demand of complainant, unless reasons were assigned which were satisfactory to him. Here is a clear and sharp disagreement as to the construction of the contract, and either party is entitled, in a proceeding for its specific enforcement, to a construction by the court.

We regret that we have not been able to condense the arguments for the complainant into smaller space. The material provisions of the contract covering all the relative rights of the parties, can be stated in small com-

pass: but the scheme of defense has consisted in distorting a great number of details; and probably in the exercise of excessive caution we have given more attention than was necessary to restoring to them their proper proportions.

The case is submitted.

THOS. F. WITHROW,
THOMAS S. WRIGHT,
A. E. PATTISON,
For Complainant and Appellant.

APPENDIX.

GENERAL STATUTES OF COLORADO; CHAPTER XIX, SECTION 240.—CORPORATIONS.

240. *Power—Capacities—seal—realty—borrow money—Pledge.*

SEC. 4. Corporations formed under this act shall be bodies corporate and politic in fact and in name, by the name stated in such certificate, and by that name have succession for the period for which they are organized; may in any court of law or equity in this state sue and be sued, may have a common seal, which they may alter or renew at pleasure, by filing an impression of the same in the office of the Secretary of State; may own, possess and enjoy so much real and personal estate, as shall be necessary for the transaction of their business, whether acquired by purchase, grant, devise, gift or otherwise, and may from time to time sell and dispose of the same or any part thereof when not required for the use of the corporation. They may borrow money and pledge their franchises and property, both real and personal, to secure the payment thereof, and may have and exercise all the powers necessary and requisite to carry into effect the objects for which they may be formed, as named in their certificate of incorporation.